DOCKET

No. 08-1470

Title: Mary Berghuis, Warden, Petitioner
v.
Van Chester Thompkins

Docketed: May 29, 2009
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (06-2435)
Decision Date: November 19, 2008
Rehearing Denied: February 24, 2009

Questions Presented

Date	Proceedings and Orders
May 26 2009	Petition for a writ of certiorari filed. (Response due June 29, 2009)
Jun 8 2009	Waiver of right of respondent Van Chester Thompkins to respond filed.
Jun 24 2009	DISTRIBUTED for Conference of September 29, 2009.
Jun 30 2009	Response Requested . (Due July 30, 2009)
Jul 21 2009	Brief of respondent Van Chester Thompkins in opposition filed. (Distributed)
Jul 21 2009	Motion for leave to proceed in forma pauperis filed by respondent.
Aug 28 2009	Reply of petitioner Mary Berghuis, Warden filed. (Distributed).
Sep 30 2009	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Sep 30 2009	Petition GRANTED.
Nov 2 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including December 1, 2009.
Nov 2 2009	The time within which to file respondent's brief on the merits is extended to and including January 15, 2010.
Nov 10 2009	Brief amicus curiae of Wayne County, Michigan filed.
Nov 25 2009	The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including December 4, 2009.
Nov 25 2009	The time within which to file respondent's brief on the merits is further extended to and including January 19, 2010.
Nov 30 2009	SET FOR ARGUMENT ON Monday, March 1, 2010.
Dec 4 2009	Joint appendix filed.
Dec 4 2009	Brief of petitioner Mary Berghuis, Warden filed.
Dec 10 2009	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Dec 11 2009	Brief amicus curiae of United States filed.
Dec 26 2009	CIRCULATED.
Dec 31 2009	Record received from U.S.C.A. for Sixth Circuit. (1 envelope)
Jan 6 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 19 2010	Brief of respondent Van Chester Thompkins filed. (Distributed)
Jan 26 2010	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. (Distributed)
Feb 18 2010	Reply of petitioner Mary Berghuis, Warden filed. (Distributed)
Feb 19 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae

and for divided argument GRANTED.

Feb 19 2010 Record from U.S.D.C. for District of Michigan (Detroit) is electronic.

Mar 1 2010 Argued. For petitioner: B. Eric Restuccia, Solicitor General, Lansing, Mich.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Elizabeth L. Jacobs, Detroit, Mich.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 08-1470 MAY 26 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

In the Supreme Court of the United States

MARY BERGHUIS, Warden,
Petitioner,

v

VAN CHESTER THOMPKINS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them.

II. Whether the Court of Appeals failed to afford the State court the deference it was entitled to under 28 U.S.C. §2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkin's guilt allowed the State court to reasonably reject the claim.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Mary Berghuis, Warden of a Michigan correctional facility. The Respondent is Van Chester Thompkins, Jr., an inmate.

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OPINIONS BELOW

The opinion of the Court of Appeals is published at 547 F.3d 572 (6th Cir. 2008). Appx 1a-37a. The Order of the United States District Court denying the petition is unpublished. Appx 39a-72a. The decision of the Michigan Court of Appeals affirming Thompkins's conviction is unpublished. Appx 74a-82a.

JURISDICTION

The federal district court reviewed the petition for writ of habeas corpus pursuant on 28 U.S.C. §2254(d). Following the denial of the petition, Thompkins appealed to the United States Court of Appeals for the Sixth Circuit. That Court, in an opinion filed November 19, 2008, reversed and directed the district court to grant the petition on two grounds: (1) that Thompkins's rights were violated under *Miranda*, and (2) Thompkins was denied the effective assistance of counsel. The State of Michigan filed a petition for rehearing and suggestion for rehearing en banc which was denied on February 24, 2009. Appx 38a. This petition for writ of certiorari is filed within ninety (90) days of the judgment of the circuit court. 28 U.S.C. §2101(c). See also Sup. Ct. R. 13(1), (3) and Sup. Ct. R. 20. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The constitutional provision involved is the Fifth Amendment. The statute involved is 28 U.S.C. §2254(d), which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody

pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

The State of Michigan files this petition for writ of certiorari seeking an order vacating the opinion of the United States Court of Appeals for the Sixth Circuit in *Thompkins v. Berghuis*.[1] The Sixth Circuit determined that an interrogating officer is forbidden from attempting to persuade a criminal defendant to waive his *Miranda* rights after the defendant indicates an understanding of his rights but does not indicate a desire to assert or waive them. The opinion of the Sixth Circuit expands the right created in *Miranda v. Arizona* and runs contrary to 28 U.S.C. §2254(d)(1), which limits federal habeas review of State court convictions to what is already clearly established by Supreme Court law.[2] Nothing in the Constitution or this Court's jurisprudence prohibits an officer from continuing to speak to a defendant after he indicates an understanding of his rights but has not yet decided whether to invoke them. This error of the Sixth Circuit is particularly troubling because it creates this expansion of a constitutional rule in a habeas case arising out of State court conviction in which review is limited by §2254(d).

Miranda ensures that a defendant is informed of his rights to remain silent and to have the assistance of counsel in light of the coercion inherent in a custodial interrogation. Its function is fully served at the point a defendant is read his rights, indicates his understanding of those rights, and chooses not to assert them. Prohibiting a non-coercive communication between a police officer after the warnings have been given and understood but not invoked, adds a layer of prophylaxis not justified by *Miranda's* rationale. The coercion

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[1] *Thomkins v. Berghuis*, 547 F.3d 572 (6th Cir. 2008).

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

inherent in a custodial interrogation is negated by the understanding receipt of the warnings themselves. Non-coercive communications after an understanding receipt of the warnings do not involve any of the dangers *Miranda* was designed to overcome.

Adding the new layer of prophylaxis to *Miranda* without an adequate rationale is in itself sufficiently serious to merit review by this Court. Supreme Court Rule 10(a), (c). But here, the Sixth Circuit expanded the law in a habeas action arising from a State court conviction, which also is an important question of federal law. Its review of the claim should have been limited to whether the State court decision ran contrary to, or involved an unreasonable application of, clearly established Supreme Court law under §2254(d).

The Sixth Circuit also granted Thompkins habeas relief on his claim of ineffective assistance of counsel without limiting its review of the claim as required by §2254(d). The overwhelming evidence of Thompkins's guilt allowed the State court to reasonably reject this claim. This error, particularly when coupled with the Sixth Circuit's other error on the Fifth Amendment issue, warrants review by this Court.

The State of Michigan notes that it is filing three other petitions for certiorari contemporaneously with this petition. See *Prelesnik v. Avery,* (08-1389); *Metrish v. Newman,* (08-1401); and *Berghuis v. Smith,* (08-1402). All four are murder cases, all published, all reaching final disposition in February 2009, in which the State of Michigan contends the Sixth Circuit failed to accord the State court decisions with the proper level of deference required by AEDPA. These cases evidence a pattern by the Sixth Circuit of usurping the role of the State courts by failing to properly apply AEPDA. This failure has

dramatic consequences for this case, by wrongly vacating Thompkins's murder conviction. This Court should grant this petition.

STATEMENT

A jury convicted Van Chester Thompkins of one count of first-degree murder, one count of assault with intent to commit murder, and several firearm offenses. The conviction results from an altercation in which he fatally shot one person and shot and wounded another. The surviving victim identified Thompkins and testified against him at trial. Thompkins confessed to a friend—the details of which were corroborated by physical evidence—and that friend also testified against him at trial. Thompkins's co-defendant also testified against him, stating that he heard the shots and saw Thompkins holding a semi-automatic weapon. After the crime, Thompkins fled to Ohio and attempted to change his identity. When he was arrested in Ohio he gave a false name. Appx 42a-46a.

The district court succinctly described facts surrounding Thompkins's interrogation by police following his arrest. Southfield Police Detective Christopher Helgert was the only person to testify regarding Thompkins's interrogation following his arrest in Ohio. Appx 46a. Helgert testified that after Thompkins was read his *Miranda* warnings, he neither requested an attorney nor indicated that he did not want to talk to the officers. The officers then spoke to Thompkins for approximately two hours and forty-five minutes. Helgert and his partner did most of the talking; Thompkins occasionally responded saying, "yeah," "no," or "I don't know." Appx 46a. Thompkins gave both verbal and non-verbal responses to questions including "eye contact," "a nod of the head," and "look[ing] up." Appx 5a.

Helgert testified that towards the end of the interview, he asked Thompkins if he prayed to God. Helgert testified that Thompkins said, "yes" and that his demeanor changed at this point in that he looked directly at Helgert with moistened eyes and confessed to the crime:

> Helgert then asked [Thompkins]: "Do you pray to God to forgive you for shooting that boy down?" Helgert testified that [Thompkins] answered "yes" and then looked down. The interview ended shortly thereafter. Appx 46a.

In his direct appeal, the Michigan Court of Appeals rejected Thompkins's contention that his *Miranda* rights were violated in an unpublished opinion. Appx 75a-76a.[3] The Michigan Supreme Court subsequently denied leave to appeal. Appx 73a.[4]

Subsequently, Thompkins filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in which he raised multiple claims, including his *Miranda* claim and a claim that he was denied the effective assistance of trial counsel. Appx 83a-91a. The district court denied the petition but granted a certificate of appealability. The Sixth Circuit found that these two claims were meritorious. The Sixth Circuit found that Thompkins's statement to police should have been suppressed because he never implicitly or explicitly waived his *Miranda* rights. It also found that Thompkins was denied the effective assistance of counsel for his counsel's failure to request a limiting jury instruction.

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[3] *People v. Thompkins*, Mich. Ct. App. No. 242478 (February 3, 2004).

[4] *People v. Thompkins*, 471 Mich. 866; 683 N.W.2d 676 (2004).

REASONS FOR GRANTING THE PETITION

In this habeas case from a State conviction, the Sixth Circuit erroneously extended the rule in *Miranda* in a manner that will prevent police officers from attempting to non-coercively persuade a defendant to cooperate after the defendant indicates his understanding of his rights but has not yet decided to invoke them. §2254(d) barred the Sixth Circuit from expanding *Miranda* in this manner.

Neither *Miranda* nor its progeny prohibit interaction between an officer and a defendant after warnings have been given and acknowledged but before the invocation of rights. *Miranda* was designed to protect a core value of the Fifth Amendment by preventing the police from obtaining an incriminating statement from a defendant during a custodial interrogation without first ensuring that the suspect understands his right to remain silent and his right to counsel. There is no constitutionally-based rationale to add another layer of protection to prevent police from attempting to non-coercively persuade a defendant to cooperate after the defendant has indicated his understanding of those rights, but has chosen not to exercise them.

After the warnings have been understandingly received, the coercion inherent in a custodial interrogation has been dispelled. The defendant can cease the questioning at any time if he chooses. The only issue remaining is whether the defendant's participation in the interview by the police is voluntary. There was nothing coercive about Thompkins's confession here. While the post-warning interview in this case lasted for more than two-hours, it did not contain any of the hallmarks of coercion: a single reference to Thompkins's guilty conscience produced an incriminating statement.

There was no Fifth Amendment violation. §2254(d) required the Sixth Circuit to limit itself to the body of already clearly established Supreme Court law, and it prevented the Sixth Circuit from expanding *Miranda's* coverage to prohibit the interaction that took place between Thompkins and the police in this case.

Additionally, the Sixth Circuit did not give adequate deference to the State court decision that Thompkins received the effective assistance of counsel. This case involved weighty evidence of Thompkins's guilt. It was not objectively unreasonable for the State court to have found that the failure of the trial court to read a limiting instruction to the jury did not result in prejudice.

I. The Sixth Circuit wrongly expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate after informing him of his rights, and the defendant did not invoke them but did not waive them.

The *Miranda* warnings build a fence around the Fifth Amendment by dispelling the coercion inherent in a custodial interrogation. When the warnings have been understandingly received, the inherent coercion has been accounted-for and what remains is the prohibition against obtaining a confession that is the product of force, threats or promises by the government.[5] The Sixth Circuit unjustifiably raised the fence by requiring even non-coercive communication to stop before a defendant invokes his right to remain silent. This is not supported by the Fifth Amendment, and the Sixth Circuit cannot create new rules in a habeas case.

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[5] *Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991).

A. Miranda does not prohibit interaction between an officer and a defendant after warnings have been given but before the invocation of rights by the defendant.

The fundamental purpose of *Miranda* is "to assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process."[6] It is the inherent "compulsion" that a custodial interrogation brings to bear upon a defendant that the *Miranda* warnings were designed to protect against.[7] When the warnings are given and understood this purpose is fully served. The rationale prohibiting communication after the invocation of the right to remain silent does not extend to a situation where the defendant has neither invoked nor waived his rights.

In the context of equivocal requests for counsel, this Court was "unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue."[8] So too, just because a suspect *might* want to remain silent, the Fifth Amendment protection against

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[6] *Moran v. Burbine*, 475 U.S. 412, 426 (1986) ("*Miranda* attempted to reconcile [competing] concerns by giving the defendant the power to exert some control over the course of the interrogation"); *Oregon v. Elstad*, 470 U.S. 298, 308 (1985) ("Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities").

7 *Mathis v. United States*, 391 U.S. 1, 5 (1968); *Dickerson v. United States*, 530 U.S. 428, 435 (U.S. 2000) ("the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.")

[8] *Davis v. United States*, 512 U.S. 452, 462 (1994).

compulsory self-incrimination does not require communication to stop. Where a defendant has not decided to invoke his right to remain silent, the police are permitted to continue to talk with him. The coercion inherent in a custodial interrogation is alleviated by the understanding receipt of the warnings. And continued communication after that point does not render an otherwise non-coercive confession violative of the Constitution. The Constitution does not stop the police from speaking to someone who has been arrested once that person is informed of his rights. The Constitution only requires that the participation be voluntary.[9]

In *Connecticut v. Barrett*, this Court rejected the contention that a limited invocation of one's rights suffices to bar questioning where the defendant only agreed to give an oral statement to the police.[10] So too here, the fact that Thompkins was unwilling to sign the advice of rights form, and only orally stated that he understood them, does not indicate that he wished to invoke them. The only evidence offered to the State court demonstrated that Thompkins indicated an understanding of his rights, listened to the speech given by the officer, and then elected to cooperate when he made an incriminating statement. Thompkins's right to stop the interview remained unfettered throughout the interrogation process. The fact that Thompkins was unresponsive through much of the officer's attempt to persuade him to cooperate does not point to an invocation of the right to remain silent. This Court has made it clear that a suspect's refusal to answer particular questions is "not [an] assertion[] of his right to remain silent" because such a refusal does not amount to a request to terminate the interview altogether.[11]

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[9] *Blackburn v. United States*, 361 U.S. 199, 208 (1960).
[10] *Connecticut v. Barrett*, 479 U.S. 523, 530 (1987).
[11] *Fare v. Michael C.*, 442 U.S. 707, 727 (1979).

The theory of *Miranda* is that "full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process."[12] The Constitution does not protect against freely-given confessions. Once a defendant is armed with knowledge of these rights, his choice whether to exercise his privilege to remain silent should be viewed as an act of free will.[13] That reasoning is wholly applicable in a case, such as this one, where the suspect never invokes his rights after expressing his understanding of them, and otherwise chooses not to cut-off his dialogue with the police. There was no coercion here. If a defendant is informed of and understands his rights but never invokes them, there is no reason to indulge in *Miranda's* presumption that his answers to any questions "cannot be other than the product of compulsion."[14]

In rejecting this analysis, the Sixth Circuit simply ignored first principles. Thompkins was read his rights, he understood them, and he never invoked them. A waiver of *Miranda* rights need not be explicit. This case is factually similar to this Court's decision in *North Carolina v. Butler*, in which this Court held that "an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case."[15] This Court explained that to show an implied waiver "mere silence is not enough," but that this "does not mean that the defendant's silence coupled with an understanding of his rights and a course of

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[12] *Moran*, 475 U.S. at 427.

[13] *United States v. Washington*, 431 U.S. 181, 188 (1977).

[14] *Miranda*, 384 U.S. at 474.

[15] *North Carolina v. Butler*, 441 U.S. 369 (1979).

conduct indicating waiver, may never support a conclusion that a defendant has waived his rights."[16]

The facts of this case evidence the need for this Court to clarify the standard at issue under the Fifth Amendment and *Miranda*. The Sixth Circuit mischaracterized *Butler* as a narrow exception to the requirement of an explicit waiver, and finding that because the facts of Thompkins's case did not fit within the narrow exception, that error must have occurred. But the *Butler* decision did not set forth the minimum requirements for a waiver.

The other circuits that examined similar cases did not reach this result. In *Gorham v. Franzen*, the Seventh Circuit held that the defendant had waived his *Miranda* rights where he indicated his understanding of his rights but did not initially waive them.[17] After hearing the evidence against him, the defendant made a statement, and the Seventh Circuit determined that his "failure to invoke clearly those rights, which defendant knew and understood, amounted to a waiver." Likewise the First and Fifth Circuit concluded that there was an implied waiver where immediately after a defendant indicated an understanding of his rights he made a statement without an express waiver.[18]

In contrast, the Sixth Circuit reasoned that Thompkins never waived his rights despite the fact that he indicated his understanding of his rights, occasionally responded to Halgert's statements, gave both verbal and non-verbal responses to questions, and then made an incriminating statement. The underlying principle of

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[16] *Butler*, 441 U.S. at 373.

[17] *Gorham v. Franzen*, 760 F.2d 786, 796 (7th Cir. 1985).

[18] See, e.g., *Bui v. DiPaolo*, 170 F.3d 232 (1st Cir. 1999); *United States v. Ogden*, 572 F.2d 501, 502 (5th Cir. 1978).

this analysis requires that a defendant make an affirmative waiver before the police may continue the interview. Neither the Fifth Amendment, nor this Court's *Miranda* jurisprudence requires this conclusion.

What occurred in this case was an interrogation that did not violate the Constitution or any of *Miranda*'s existing mandates. The warnings were given. They were understood by Thompkins. Thompkins did not assert his rights but had not decided whether to waive them either. The police then used a non-coercive speech to convince Thompkins to submit to questioning. The Sixth Circuit noted that during the speech, Thompkins occasionally nodded his head or gave short verbal responses. Appx 5a, 46a. And finally, Thompkins waived his rights by answering a single question. There is no evidence that Thompkins was "threatened, tricked, or cajoled" into this waiver.[19]

Thompkins's will was not overborne by the speech. Police appeals to the defendant's sympathies, such as the famous 'Christian burial speech' ploy, do not render a confession involuntary.[20] A one-sentence appeal to a defendant's conscience is far removed from the types of coercive conduct the Founding Fathers who drafted the Fifth Amendment had in mind.

Under the expansion of *Miranda* created by the Sixth Circuit in this case, police are prohibited from speaking to a defendant after he indicates he understands his rights but says nothing further. The effect of the Sixth Circuit decision is to create a rule that the police may not attempt to non-coercively persuade a

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[19] *Miranda*, 384 U.S., at 476.

[20] 2 LaFave, Israel and King, Criminal Procedure § 6.2 (c), p. 636 (3rd ed. 2007); *State v. Woods*, 632 S.E.2d 654 (Ga. 2006); *Nelson v. State*, 850 S.2d 514, 523 (Fla. 2003).

defendant to cooperate after he indicates he understands his rights. This requirement has not been previously imposed by this Court before, and the granting of certiorari is necessary to ensure the integrity of this Court's decisions.

B. § 2254(d) barred the Court of Appeals from expanding *Miranda*.

The Sixth Circuit expanded the *Miranda* rule in this case despite the fact that the issue arose in a habeas action from a State court conviction. In habeas actions review is limited to whether the State court decision involved an objectively unreasonable application of already existing and clearly established Supreme Court law.[21]

This Court has taken a very narrow view of what constitutes clearly established law. For example, in *Carey v. Musladin*, and *Wright v. Van Patten* it reversed grants of habeas relief because the legal basis for the claims could not be supported by this Court's precedent.[22] Here too, the Sixth Circuit went beyond the rights created by this Court's clearly established law.

In *Carey*, this Court reversed the Circuit Court's grant of relief when spectators wore buttons depicting the victim of a homicide because this Court had not yet confronted the effort of spectator-based conduct on the fairness of the trial. This Court followed *Carey* in *Wright*, finding that a claim could not be based on clearly established law because this Court had not previously held that a counsel's participation in a plea conference by speakerphone was a denial of counsel.

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[21] §2254(d).

[22] *Carey v. Musladin*, 549 U.S. 70 (2006); *Wright v. Van Patten*, 128 S. Ct. 743 (2008).

Similarly, nothing in this Court's decisions prohibit a police officer from attempting to convince a defendant to cooperate after he indicates an understanding of his *Miranda* rights, but has not decided yet whether to waive them or invoke them. With an absence of clearly established precedent forbidding what occurred in this case, the Sixth Circuit was required by §2254(d) to defer to the State court decision.

The action here by the Sixth Circuit also is not an isolated failure to accord a State court decision the proper deference under AEDPA. Indeed the Sixth Circuit has exhibited a clearly identifiable pattern in its failure to follow AEDPA. In this regard the State would note that it is contemporaneously seeking certiorari in three other murder cases, all published, in which it contends that the Sixth Circuit, in granting habeas relief, failed to properly apply the AEDPA standard.[23]

II. The Sixth Circuit did not give adequate deference to the State court decision that Thompkins received the effective assistance of counsel.

The Sixth Circuit also granted Thompkins relief on the ground that his counsel's failure to request a limiting jury instruction constituted prejudicial

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[23] See *Avery v. Prelesnik*, 548 F.3d 434 (6th Cir. 2008)(the Sixth Circuit rejected the State court's determination that there was no prejudice on the claim of ineffective assistance of counsel because alibi testimony is always a jury question); *Newman v. Metrish*, 543 F.3d 793 (2008)(the Sixth Circuit determined that there was insufficient evidence even though there was compelling circumstantial evidence of defendant's guilt including evidence linking him to the murder weapons); and *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008)(the Sixth Circuit adopted a new rule – the comparative disparity test – for evaluating whether there was a fair cross section of the community under the Sixth Amendment).

ineffective assistance of counsel. In doing so, it first erroneously examined the claim *de novo*, and then concluded that the contrary decision by the State court was objectively unreasonable.

The Sixth Circuit did not afford the State court decision the deference it was due under §2254(d). This Court has consistently drawn a distinction between State court decisions applying a broad constitutional standard and ones that apply a narrow rule. Where a standard is at issue, State court decisions are given greater leeway:

> If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.[24]

In *Knowles v. Mirzayance*, this Court held that ineffective-assistance-of-counsel claims must be given extra latitude in light of the general nature of the rule: "because the *Strickland* standard is a general standard, a State court has even more latitude to reasonably

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[24] *Yarborough v. Alvarado*, 541 U.S. 652 (2004).

determine that a defendant has not satisfied that standard."[25]

When the State court in this case found that Thompkins was not prejudiced by his counsel's failure to request a limiting instruction, it was applying a broad constitutional standard. And because the evidence presented at trial against Thompkins was strong, it was not objectively unreasonable for the State court to conclude that there was no reasonable probability that the result of his trial would have been different had the instruction been requested.[26]

The trial court—which unlike the Sixth Circuit observed the testimony and evidence first-hand—recognized that the evidence against Thompkins was quite strong. The morning following the shooting, the surviving victim, Frederick France, positively identified Thompkins as the shooter and Purifoy as the driver from the surveillance photograph. France was 100% sure Thompkins was the shooter. Thompkins told another man that he had to "pop them niggers." Appx 42a-46a.

After the shooting, Thompkins fled the State for over a year and concealed his identify. Thompkins attempted to flee once again when he was eventually discovered in Ohio. When Thompkins was arrested in Ohio, he had on his person a non-operator's license, a social security card and a birth certificate, all in names different from his own. He insisted his name was a name other than his own. Appx 42a-46a. In Michigan, evidence of flight, which would include leaving the

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[25] *Knowles v. Mirzayance*, 556 U. S. ___ (2009).

[26] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

jurisdiction, is consciousness of guilt.[27] So is concealing one's identity.[28]

Thompkins was the owner or the primary operator of the van used during the murder which was "dumped" and "stripped" after the murder—only after the identifying gold rims and stereo were removed. Even if the jurors did not believe Thompkins was the shooter, he could have been convicted under an aider or abettor theory and the jury was so charged. Appx 42a-46a.

The Sixth Circuit erred in finding that Thompkins was prejudiced by his counsel's failure to request a limiting instruction, and it compounded its error by focusing on its own determination that prejudice occurred rather than focusing on whether the decision of the State court was reasonable.

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[27] *People v. Coleman*, 210 Mich.App. 1, 4; 532 N.W.2d 885, 887 (1995); *People v. Cutchall*, 200 Mich.App. 396, 401; 504 N.W.2d 666, 668 (1993).

[28] *Cutchall, supra* at 400.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision of the Sixth Circuit should be reversed.

Respectfully submitted

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Dated: May 2009

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0409p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VAN CHESTER THOMPKINS, JR.,
Petitioner-Appellant, No. 06-2435
V.
MARY BERGHUIS, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 05-70188—Patrick J, Duggan, District Judge.

Argued: February 1, 2008
Decided and Filed: November 19, 2008
Before: MOORE, CLAY, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Elizabeth L. Jacobs, LAW OFFICE, Detroit, Michigan, for Appellant. Janet A. VanCleve, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. ON BRIEF: Elizabeth L. Jacobs, LAW OFFICE, Detroit, Michigan, for Appellant. Brad H. Beaver, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. Petitioner-Appellant Van Chester Thompkins, Jr. ("Thompkins") appeals the district court's denial of his petition for a writ of habeas corpus. Following a July trial in 2002 in Michigan state court, Thompkins was convicted of first-degree murder, assault with intent to commit murder, and several firearms-related charges. After exhausting the state appeals process, Thompkins filed in the United States District Court for the Eastern District of Michigan a petition for a writ of habeas corpus, which the district court denied. The district court certified three claims for appeal: (1) whether Thompkins's confession was obtained in violation of the Fifth Amendment when the police officers questioned Thompkins for nearly three hours, the officers described the interview as "very, very one-sided," and the officers described Thompkins as "not verbally communicative" and as having "shared very limited verbal responses" while " remain silent"; (2) whether Thompkins's right to due process was violated when the prosecution offered evidence of accomplice-witness Eric Purifoy's Jury verdict and guilty plea conviction on charges stemming out of the same incident giving rise to Thompkins's charges; and (3) whether Thompkins was denied effective assistance of counsel when his counsel failed to request that the trial court instruct the jury that it could consider the evidence relating to the jury verdict and guilty-plea conviction of accomplice-witness Purifoy only in evaluating Purifoy's credibility and not as substantive evidence of Thompkins's guilt.

For the reasons discussed below, we **AFFIRM** the district court's denial of Thompkins's petition for a writ of habeas corpus as to his claim of prosecutorial misconduct, but we **REVERSE** the judgment of the

district court denying relief as to his Fifth Amendment and ineffective-assistance-of-counsel claims and **REMAND** the case with instructions that the district court order that Thompkins be released from state custody unless the State of Michigan commences a new trial within 180 days of the final federal-court judgment in this case.

I. BACKGROUND

On January 10, 2000, a shooting occurred around 9:00 p.m. in a strip mall parking lot in Southfield, Michigan. Samuel Morris ("Morris") died from multiple gunshot wounds, while his friend Frederick France ("France") survived despite being shot several times. At Thompkins's trial, France testified that he and Morris were driving through the mall parking lot when a group of several men walked in front of their car and began staring at them. Joint Appendix "J.A.") at 264-65 (Trial Tr. 5/13/2002 at 197-98). France testified that he and Morris got out of their car and that France and Thompkins exchanged words as Thompkins and the others in his group approached a white and blue van. J.A. at 270-73 (Trial Tr. 5/13/2002 at 204-07). Morris and France reentered their car and began driving away, but the van soon pulled up alongside them so that the passenger-side window of the van was adjacent to the driver-side window of Morris and France's car. J.A. at 273-81 (Trial Tr. 5/13/2002 at 207-215). France testified that he had no doubt that Thompkins was seated in the passenger seat of the van and that Thompkins said "What you say, Big Dog" immediately before drawing a gun and firing several shots into Morris and France's car. J.A. at 280-81 (Trial Tr. 5/13/2002 at 214-15). The next day, while France was in the hospital, two police officers showed him a photograph taken by a security camera inside Lou's Deli, a store at the mall where the shooting occurred, and France identified three

individuals as being respectively the shooter, the driver, and another passenger in the van. J.A. at 287-89 (Trial Tr. 5/13/2002 at 230, 232, 237). France identified Thompkins as the shooter. J.A. at 288 (Trial Tr. 5/13/2002 at 232).

The police focused their investigation into the shooting on three men, Thompkins, Eric Purifoy ("Purifoy"), and Myzell Woodward ("Woodward"). Woodward, who contacted the police shortly after the incident, apparently was never charged. Pet'r Br. at 6. Purifoy turned himself in to the police, and he was tried in August 2000 on the same charges as would later be brought against Thompkins. J.A. at 289 (Trial Tr. 5/13/2002 at 237); J.A. at 345-47 (Trial Tr. 5/16/2002 at 85-87). Purifoy was acquitted of the murder and assault charges, convicted of carrying a concealed weapon, and after his trial Purifoy pleaded guilty to three further firearm-related counts. J.A. at 345-47 (Trial Tr. 5/16/2002 at 85-87).

Thompkins was not found until over a year after the shooting when he was arrested along with three other men near Columbus, Ohio, on February 19, 2001. J.A. at 319-20, 331-32 (Trial Tr. 5/16/2002 at 35-36, 55-56). Thompkins attempted to escape while the officers were handcuffing the others and, when recaptured, gave the officers various false pieces of identification and insisted that his name was Detniuan Isiah Reed. J.A. at 324-25, 328-29 (Trial Tr. 5/16/2002 at 42-43, 52- 53). When Thompkins was fingerprinted at the Franklin County (Ohio) jail, the results revealed his true identity as Van Chester Thompkins, Jr. J.A. at 331-32 (Trial Tr. 5/16/2002 at 55-56).

On February 22, 2001, Detective Christopher Helgert ("Helgert") from the Southfield (Michigan) Police Department interrogated Tompkins at the jail

in Ohio. J.A. at 149 (Op. & Order Denying Mot. to Suppress at 1). At a hearing in October 2001 regarding Thompkins's motion to suppress statements that lie made during the February 2001 interrogation, Helgert testified that he and his partner interviewed Thompkins for approximately three hours. J.A. at 213-14 (Supp. Hr'g Tr. at 78-79). Helgert read Thompkins a form that advised him of his Miranda rights and got Thompkins to confirm orally his understanding of those rights, but Thompkins refused to sign the form acknowledging that the officers had lead him his rights. J.A. at 214-15, 220-23 (Supp. Hr'g Tr. at 79-80, 85-88). Helgert described the interview as "very, very one-sided," J.A. at 217 (Supp. Hr'g Tr. at 82), and as "nearly a monologue," J.A. at 227 (Supp. Hr'g Tr. at 92). Helgert described Thompkins as "so uncommunicative," J.A. at 217 (Supp. Hr'g Tr. at 82), as "not verbally communicative," J.A. at 227 (Supp Hr'g Tr. at 92), and remarked that "[l]argely, he remained silent," J.A. at 229 (Supp. Hr'g Tr. at 94). Helgert also stated that "Mr. Thompkins shared very limited verbal responses with us," J.A. at 217 (Supp. Hr'g Tr. at 82), and that Thompkins "talk[ed] with us very sporadically," J.A. at 216 (Supp. Hr'g Tr. at 81). Asked whether Thompkins had "consistently exercised his right to remain substantively silent for at least two hours and forty-five (45) minutes," Helgert replied "Yes, that's right." J.A. at 232 (Supp. Hr'g Tr. at 97). On re-direct, Helgert stated that occasionally Thompkins gave both verbal and non-verbal responses to the questions and that he understood Thompkins's "eye contact," "a nod of the head," and "look[ing] up" as engaging in limited conversation. J.A. at 236-37 (Supp. Hr'g Tr. at 101-02). Helgert also testified that "I don't know" was a "quite prevalent" response to his questions, as well that "[s]ometimes [Thompkins's response] would be a word or two. A 'yeah,' or a 'no,' or 'I don't know. '"J.A. at 233, 236 (Supp. Hr'g Tr. at 98, 101).

After two hours and forty-five minutes of the "very, very one-sided" interview, Helgert "tried to take a different tac[k], I guess what I call a spiritual tac[k]" and he asked Thompkins "whether or not he believed in God." J.A. at 217 (Supp. Hr'g Tr. at 82). Helgert testified that Thompkins

> made eye-contact with me for one of the few times that he did for the interview. I saw his eyes well up with tears. He answered me orally and said, "Yes."
>
> I asked if he had prayed to God? And he said "Yes."
>
> And I asked him if he had asked God to forgive him for—I believe the words were, and I quoted them in my report verbatim "shooting that boy down." And he answered, "Yes."

J.A. at 218 (Supp. Hr'g Tr. at 83). Helgert testified that Thompkins "refuse[d] to write anything," that Thompkins "wouldn't touch the pen or paper that my partner placed in front of him," and that shortly after this exchange the interview was terminated. J.A. at 218-19 (Supp. Hr'g Tr. at 83-84). On May 10, 2002, the Michigan state court denied Thompkins's motion to suppress his statements, reasoning that Thompkins "never invoked his right to remain silent, and participated in the interview by making eye contact, nodding, and answering questions with, 'I don't know.'" J.A. at 152 (Order Denying Mot. to Suppress at 4).

On May 13, 2002, Thompkins's trial began before a jury in the Oakland County Circuit Court, and Thompkins states that "[T]he defense theory was that Eric Purifoy was the shooter and that [Thompkins] was merely present." Pet'r Br. at 7. The prosecution presented the testimony of several witnesses who saw

or heard parts of the altercation and shooting in the mall parking lot. *See* Resp't Br. at 6-8. France testified about the interactions leading up to the shooting; he also testified about identifying Thompkins as the shooter and Purifoy as the driver after seeing photographs of them the day after the shooting when France was in the hospital. J.A. at 287-88 (Trial Tr. 5/13/2002 at 231-32). The prosecution also asked France about what he knew about Purifoy's trial, and France responded that Purifoy "got charged, but he got found not guilty on having anything to do with this," with the prosecution confirming that "this" involved "[t]he murder." J.A. at 289 (Trial Tr. 5/13/2002 at 237). On cross-examination, France stated that at some point police officers had presented him with a photo-lineup in which he picked out a person other than Thompkins. J.A. at 295-97 (Trial Tr. 5/14/2002 at 48-50).

The prosecution offered the testimony of Omar Stephens ("Omar"),[1] who stated that he and Thompkins were friends and that he had a sister named Tamika. J.A. at 307-11 (Trial Tr. 5/16/2002 at 5-9). Omar stated that he and Tamika had a phone conversation with Thompkins approximately one month after the shooting, after Omar saw Thompkins's picture on television. J.A. at 308-10 (Trial Tr. 5/16/2002 at 6-8). Omar testified that Thompkins explained that the shooting victims "got into it" and

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[1] The record contains some uncertainty as to whether Omar's last name is Stephens or Allen. J.A. at 426-27 (Trial Tr. 5/17/2002 at 83-84) (witness referring to "Omar Allen"); see also J.A. at 156-61 (Affidavits of Kenneth Lee and Omar Allen) (asserting that Omar's last name is Allen and that "[h]is testimony in court that Thompkins had confessed to him was a total lie').

that "[h]e just told . . . me he had to pop them up." J.A. at 311 (Trial Tr. 5/16/2002 at 9). Omar also testified that around the time of the shooting Thompkins had been driving a van matching the description of the van used in the shooting. J.A. at 312-13 (Trial Tr. 5/16/2002 at 10-11).

The prosecution called Purifoy as a witness, but he initially refused to testify, stating that he had "been advised to take the Fifth Amendment Right as far as anything concerning January 10th." J.A. at 343 (Trial Tr. 5/16/2002 at 73). After conferring with his attorney, Purifoy changed his mind and later decided to testify. J.A. at 375-76 (Trial Tr. 5/16/2002 at 153-54).[2] Purifoy stated that on January 10, 2000, Thompkins drove Purifoy and Woodward to the mall and Lou's Deli. J.A at 379-82 (Trial Tr. 5/16/2002 at 160, 164-66). Because Thompkins was unfamiliar with the area, Purifoy gave him directions and, after the group finished eating, Purifoy claimed that he took the keys to Thompkins's van for the return drive because they "had some problems getting there." *Id.* at 382. Purifoy also described the shooting, stating that Thompkins was in the passenger seat when Purifoy

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[2] Prior to Purifoy's testimony, the prosecution moved to exclude several letters that Purifoy wrote to Thompkins, arguing that the defense had produced them only the preceding day. J.A. at 179 (Fed. Dist. Ct. Op. & Order Denying Habeas Pet. at 6). In response, the defense claimed that it had not decided whether to introduce the letters and had received them only the night before the trial. *Id.* The parties ultimately resolved the matter off-the-record and the prosecution decided to enter the letters into evidence; after Purifoy testified, the trial judge read a prepared statement to the jury. See J.A. at 179, 194-95 (Op. at 6, 21-22).

pulled the van alongside Morris and France's car but that when Purifoy heard shots, he and Thompkins ducked down. J.A. at 383-91 (Trial Tr. 5/16/2002 at 167-71, 174-77). Purifoy testified that after the shots were fired he looked up and saw a gun in Thompkins's hand. J.A. at 390-91 (Trial Tr. 5/16/2002 at 176-77). The prosecution requested that the court take judicial notice that Purifoy had not received immunity for his testimony. J.A. at 401-02 (Trial Tr. 5/16/2002 at 188-89). The prosecution introduced letters written by Purifoy to Thompkins and read aloud a portion of one letter referring to Myzell Woodward, the third person in the van on the night of the shooting. The prosecution stated to Purifoy that "[y]ou know that he [Woodward] has been—he is being looked at with respect to a murder in Ohio, where he faces potentially the death penalty." J.A. at 405 (Trial Tr. 5/16/2002 at 215). The prosecution asked Purifoy about what happened at his own trial regarding these events, and Purifoy replied that "I was acquitted of the Murder charge and found guilty on Weapons Charges." J.A. at 401 (Trial Tr. 5/16/2002 at 188).

The prosecution presented the testimony of Detective Helgert, eliciting testimony from Helgert regarding the outcome of Purifoy's jury trial in which he was acquitted on murder charges arising out the same events underlying the charges in this trial. J.A. at 345-47 (Trial Tr. 5/16/2002 at 85-87). Helgert also stated that Purifoy "was charged under the theory that he was an Aider and Abettor." J.A. at 346 (Trial Tr. 5/16/2002 at 86). Helgert then testified about the interrogation of Thompkins that took place in Ohio in February 2001. J.A. at 355-66 (Trial Tr. 5/16/2002 at 100-11).

He testified that "[m]y partner and I did most of the talking in that interview," J.A. at 359 (Trial Tr. 5/16/2002 at 104), and that Thompkins "spent a lot of

his time sitting . . . simply holding his head looking down," J.A. at 364 (Trial Tr. 5/16/2002 at 109). Helgert stated that "I remember two things that he did say, he said 'He didn't want a peppermint' that my partner offered him and 'the chair that he was sitting in was hard." *Id.* Helgert explained that his interrogation tactics included "using the ostrich head in the sand metaphor. 'How do you think this is going to turn out for you?' 'You need to help yourself, you need to put forth an explanation.' 'People are going to want to hear from you." J.A. at 360-61 (Trial Tr. 5/16/2002 at 105-06). Helgert testified that "[n]one of that generated any significant response," that it "wasn't productive," and that the questions did not elicit "any admissions or denials, for that matter, it didn't really illicit [sic] any sort of reaction." J.A. at 361, 363 (Trial Tr. 5/16/2002 at 106, 108).

Helgert stated that "there were several times I had to direct his attention back to me to make eye contact with me." J.A. at 363-64 (Trial Tr. 5/16/2002 at 108-09). Describing his questions near the end of the three-hour interview, Helgert recalled that "[t]he last theme I employed" was his "spiritual tac[k] in which he "appeal[ed] to somebody's sense of morality or religion." J.A. at 364-65 (Trial Tr. 5/16/2002 at 109-10); J.A. at 217 (Supp. Hr'g Tr. at 82). This theme elicited several answers of "Yes" from Thompkins to questions about whether Thompkins believed in God, prayed, and had prayed for forgiveness for "shooting that boy down." J.A. at 365 (Trial Tr. 5/16/2002 at 110). Helgert stated that his partner placed a tablet of paper and a pen in front of Thompkins, but Thompkins "never touched" them. J.A. at 365-66 (Trial Tr. 5/16/2002 at 110-11).

Two Southfield police officers testified for the defense, Stacey Vida ("Vida") and Keith Wing ("Wing"). Vida testified that when she interviewed France at the

hospital he told her that the shooter was a light-skinned black male.[3] J.A. at 417 (Trial Tr. 5/17/2002 at 20). Wing also testified that France described the shooter as light-skinned. J.A. at 419, 421 (Trial Tr. 5/17/2002 at 46, 60). The defense presented testimony from Tamika Stephens, who denied that she was related to Omar Stephens/Allen and stated that she had been Thompkins's girlfriend for six years. J.A. at 425-26 (Trial Tr. 5/17/2002 at 82-83). Tamika testified that Omar did not have any telephone conversations with Thompkins in her presence. J.A. at 427-28 (Trial Tr. 5/17/2002 at 84-85). Finally, Tamika and Thompkins's cousin Lakeisha Mallory testified that Thompkins is left-handed. J.A. at 430, 434 (Trial Tr. 5/17/2002 at 87, 107). France, the surviving victim of the shooting, had earlier testified that the shooter used his right hand to pull the trigger. J.A. at 293 (Trial Tr. 5/14/2002 at 25).

When the case was submitted to the jury, the court did not give an instruction informing the jury that it could use the evidence regarding the result of co-defendant Purifoy's jury trial only to assess Purifoy's credibility, but Thompkins's counsel did not request such an instruction or object to its absence. The jury convicted Thompkins on all charges, and Thompkins appealed to the Michigan Court of Appeals, which affirmed his convictions in February 2004. J.A. at 163-67 (Mich. Ct. App. Op.). The Michigan Court of Appeals held that "the record does not demonstrate that defendant asserted his right to remain silent" and that because Thompkins "continued to talk with the officer, albeit sporadically. . . [t]he trial court did not clearly err in concluding that

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[3] Thompkins has a "[d]ark brown' complexion." J.A. at 294 (Trial Tr. 5/14/2002 at 27).

defendant voluntarily waived his right to remain silent and that he did not subsequently invoke his right to silence." J.A. at 163-64 (Op. at 1-2). The court noted that plain-error review applied to Thompkins's claims of prosecutorial misconduct regarding the references to the jury verdict in Purifoy's trial because Thompkins's counsel failed to object contemporaneously, and the court held that any errors that may have occurred did not result in prejudice warranting reversal. J.A. at 164-65 (Op. at 2-3). The court rejected Thompkins's claim of ineffective assistance because it found no prejudice. J.A. at 165-66 (Op. at 3-4). In particular, the court observed that "[a]lthough the [trial] court did not specifically instruct the jury that it could consider Purifoy's conviction only for purposes of his credibility, the record does not disclose an attempt to argue that conviction for an improper purpose." J.A. at 166 (Op. at 4). In July 2004, the Michigan Supreme Court denied Thompkins's application for leave to appeal the judgment of the Michigan Court of Appeals. J.A. 168 (Mich. Sup. Ct. Order).

In January 2005, Thompkins filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Michigan. J.A. at 4-75 (Petition for Writ of habeas Corpus & Brief in Support). The district court denied Thompkins's petition in September 2006. J.A. at 174-206 (U.S. Dist. Ct. Op. & Order Denying Habeas Pet.). Thompkins filed a Notice of Appeal in October 2006, J.A. at 208 (Notice of Appeal), and the district court granted a partial certificate of appealability as to the three issues summarized above. J.A. at 457-59 (Order Granting COA).

II. ANALYSIS

A. Standard of Review

Thompkins seeks relief pursuant to 28 U.S.C. § 2254, which, as amended by the Antiterrorsm and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) ("AEDPA"), provides that

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d)(1)-(2).

The Supreme Court has explained that "[a] state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Terry Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state-court decision is also "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the

Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Id.* at 412-13. A state court's decision is an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[C]learly established law under [AEDPA] encompasses more than just bright-line rules laid down by the [Supreme] Court. It also clearly includes legal principles and standards enunciated in the Court's decisions." *Taylor v. Withrow*, 288 F.3d 846, 850-51 (6th Cir.), *cert. denied*, 537 U.S. 1007 (2002). "The lack of an explicit statement" of a rule "is not determinative" because "[t]he Court has made clear that its relevant precedents include not only bright-line rules but also the legal principles and standards flowing from precedent." *Id.* at 852; *see also Panetti v. Quarterman*, 127 5. Ct. 2842, 2858 (2007) ("AEDPA does not 'require state and federal courts to wait for sonic nearly identical factual pattern before a legal rule must be applied.") (quotation omitted).

We review the district, court's legal conclusions de novo and its factual findings for clear error. *Moss v. Hofbauer*, 286 F.3d 851, 858 (6th Cir.), *cert. denied*, 537 U.S. 1092 (2002). We review the state court's determination of mixed questions of fact and law under the "unreasonable application" prong. *Barnes v. Elo*, 339 F.3d 496, 501 (6th Cir. 2003), *cert denied*, 540 U.S. 1164 (2004). AEDPA "establish[es] a presumption that a state court's determination of a factual issue is correct, and mandat[es] that '[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Moss*, 286 F.3d at 858-59 (quoting 28 U.S.C. § 2254(e)(1)). "In applying AEDPA, we look to the last state-court decision on the

merits, which in this case is the decision of the [Michigan] Court of Appeals." *Garcia v. Andrews*, 488 F.3d 370, 374 (6th cir.), *cert. denied,* 128 5. Ct. 493 (2007).

B. Thompkins's Fifth Amendment Claim

Thompkins argues that the introduction at his trial of the statements that he made near the end of the three-hour long interrogation session conducted by Detective Helgert violated the Fifth Amendment. Thompkins contends that he had effectively invoked his right to remain silent by being—in the words that Helgert used at the hearing on Thompkins's Motion to Suppress—"so uncommunicative," J.A. at 217 (Supp. Hr'g Tr. at 82), "not verbally communicative," J.A. at 227 (Supp. Hr'g Tr. at 92), and by "[l]argely remain[ing] silent," J.A. at 229 (Supp. Hr'g Tr. at 94). Further, when Thompkins's attorney asked Helgert whether Thompkins "had consistently exercised his right to remain substantively silent for at least two hours and forty-five (45) minutes," Helgert replied "Yes, that's right." J.A. at 232 (Supp. Hr'g Tr. at 97).

The district court denied Thompkins's Fifth Amendment claim because it found that the Michigan state court—which held that Thompkins did not "assert[] his right to remain silent" because "he continued to talk with the officer, albeit sporadically" such that Thompkins "voluntarily waived his right to remain silent," J.A. at 163-64 (Mich. Ct. App. Op. at 1-2)—did not unreasonably apply clearly established federal law as determined by the Supreme Court or base its decision on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. J.A. 202-03 (Op. at 29-30). Noting that "[t]he prosecution has the burden of establishing a knowing and intelligent waiver of the rights," Thompkins argues that "[t]he prosecution did not meet

its heavy burden in proving a valid waiver of the right" to remain silent given Detective Helgert's repeated descriptions of Tompkins as silent and uncommunicative and Helgert's inability to identify answers to specific questions that Thompkins made in the first two hours and forty-five minutes of the interview. Pet'r Br. at 15, 22, 21. Thompkins thus contends that the state court's decision involved both an "unreasonable application of clearly established federal law" and "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." Pet'r Br. at 22 (citing § 2254(d)(2)).

We agree with Thompkins and reverse the district court's denial of his petition because the state-court's decision involved both "an unreasonable application of[] clearly established Federal law" and "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

1. Clearly Established Federal Law Regarding Waiver and Invocation of a Suspect's Right to Remain Silent

In *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), the Supreme Court held that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination." The Supreme Court has explained that "[t]he critical safeguard" provided by the *Miranda* warnings is the knowledge of "a person's 'right to cut off questioning. " *Michigan v. Mosley*, 423 U.S. 96, 103 (1975) (quoting *Miranda*, 384 U.S. at 474). Therefore, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to

cut off questioning' was 'scrupulously honored." *Id.* at 103-04 (quoting *Miranda*, 384 U.S. at 474, 479).

In determining whether a suspect has waived her *Miranda* rights, the Supreme Court has held that that "the Supreme courts must presume that a defendant did not waive his rights; the prosecution's burden is great" *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (emphases added). Further, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda*, 384 U.S. at 475. In *Butler*, the Supreme Court re-affirmed its holding in *Carnley v. Cochran*, 369 U.S. 506,516 (1962), that "[p]resuming waiver from a silent record is impermissible," but the Court did state in *Butler* that "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Butler*, 441 U.S. at 373 & n.4. The Court in *Butler* quoted two crucial passages from its opinion in *Miranda*, observing that in *Miranda*

> this Court said: "If the interrogation continues without the presence of an attorney and a statement is taken, a *heavy burden* rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self- incrimination and his right to retained or appointed counsel."
>
> The Court's opinion went on to say: "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. *But a valid waiver will not be presumed simply from the silence of the accused*

> *after warnings are given or simply from the fact that a confession was in fact eventually obtained."*
>
> Thus, the Court held that an express statement can constitute a waiver; and that silence alone after such warnings cannot do so. But the Court did not hold that such an express statement is indispensable to a finding of waiver.

Butler, 441 U.S. at 372-73 (quoting *Miranda*, 384 U.S. at 475) (internal citations omitted) (emphases added). The Court's *Miranda* opinion emphasized that "[t]he requirement of warnings and waiver of rights is [] fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Miranda*, 384 U.S. at 476. Finally, the Supreme Court has cautioned that "[i]nvocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." *Smith v. Illinois*, 469 U.S. 91, 98 (1984).

In terms of a suspect's invocation of her right to remain silent, in Miranda the Supreme Court held that "[i]f the individual *indicates in any manner*, at any time prior to or during questioning, that lie wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74 (emphasis added). Although the Supreme Court has not addressed what conduct or statements suffice to "indicate in any manner" one's intent to invoke the right to remain silent, the Supreme Court has explained the standard governing the invocation of one's right to counsel. In *Davis v. United States*, 512 U.S. 452, 455 (1994), the Supreme Court noted that the suspect "waived his rights to remain silent and to counsel, both orally and in writing." Approximately an hour and a half into the interview, the suspect stated that "[m]aybe I should talk to a lawyer." *Id.* at 455. After the investigating

agents sought clarification as to whether the suspect wanted a lawyer, the suspect said "No, I don't want a lawyer." *Id.* Rejecting the defendant's argument that his statement that "[m]aybe I should talk to a lawyer" effectively invoked his right to counsel such that the interrogation should have ceased and his statements been suppressed, the Supreme Court held that to invoke one's right to counsel "the suspect must unambiguously request counsel" because the Court's "precedents do not require the cessation of questioning" "if a suspect makes a reference to an attorney that is ambiguous or equivocal." *Id.* at 459. The Court specifically restated its holding as establishing "that, *after a knowing and voluntary waiver of the Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Id.* at 461 (emphases added).

In terms of our review of the distinct waiver and invocation inquiries, "[a]lthough the ultimate question of whether [the suspect's] waiver was knowing and intelligent is subject to review under the standards set forth in section 2254(d), any subsidiary factual findings made by the state court are entitled to a presumption of correctness under section 2254(e)." *Valdez v. Ward*, 219 F.3d 1222, 1231(10th Cir. 2000) (internal citation omitted); *see also Williams v. Jones*, 117 F. App'x 406, 412 (6th Cir. 2004) (unpublished) (citing *Valdez*); *United States v. Rodriguez*, 518 F.3d 1072, 1076 (9th Cir. 2008) ("This court reviews a trial court's legal conclusions on *Miranda* waivers de novo, and findings of fact underlying those conclusions for clear error."); *United States v. Carter*, 489 F.3d 528, 534 (2d Cir. 2007) ("We review a district court's determination regarding the constitutionality of a *Miranda* waiver *de novo* and a district court's underlying factual findings for clear error."). In the invocation "context, we review the district court's

factual findings concerning the words a defendant used to invoke his *Miranda* rights for clear error and whether the words actually invoked those rights de novo." *Rodriguez*, 518 F.3d at 1076.

In denying Thompkins's petition, the district court quoted a First Circuit case that "concluded that *Davis* applies to both components of *Miranda*: the right to counsel and the right to remain silent" and accordingly analyzed the record to determine whether Thompkins "clearly and unequivocally invoked his right to remain silent after Helgert advised him of his *Miranda* rights." J.A. at 201-02 (op. at 28-29) (quoting *Bui v. DiPaola*, 170 F.3d 232,239(1st Cir. 1999)).[4]

2. The Michigan State Courts' Adjudication of Thompkins's Fifth Amendment Claim

In denying Thompkins's motion to suppress, the Michigan trial court rejected Thompkins's argument that his silence and general uncooperativeness during the three-hour long interview were "repeated implicit invocations of his right to silence" and instead found that "[t]he defendant never invoked his right to remain

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[4] Thompkins contends that lower courts are in conflict regarding whether the *Davis* "unambiguous request" standard for invoking the right to counsel affects the analysis of whether an individual has invoked the right to remain silent. Pet'r Br. at 18-22. Because the resolution of this issue is not critical to the outcome in this case—that is, we conclude that the prosecution failed to meet its "heavy burden" in first showing that Thompkins *waived* his *Miranda* rights—we need not address Thompkins's arguments that the *Davis* standard does not apply to invoking the right to remain silent.

silent." J.A. at 151-52 (Order Denying Mot. to Suppress at 3-4). As to the initial issue of whether Thompkins waived his rights, the trial court observed that the officers advised Tompkins of his rights, but that he refuse to sign the form. The trial court concluded that Thompkins "knowingly and intelligently waived his rights" because he "never invoked his right to remain silent, and participated in the interview by making eye contact, nodding, and answering questions with, 'I don't know." *Id.* at 152.

The Michigan Court of Appeals affirmed, and the entirety of its analysis regarding Thompkins's Fifth Amendment claim is quoted below:

> Defendant argues that the trial court erred by denying his motion to suppress his statements to the police. Defendant asserts that the police improperly continued to interrogate him after he "implicitly" invoked his right to remain silent by failing to answer the officers' questions. We disagree.
>
> The record discloses that defendant was advised of his *Miranda* rights and, according to the interrogating officer, verbally acknowledged that he understood those rights. Contrary to defendant's argument, the record does not demonstrate that defendant asserted his right to remain silent. Although defendant refused to sign the advice of rights form, he continued to talk with the officer, albeit sporadically. He answered questions with brief responses, or by nodding his head, but never said he did not want to talk or that he was not going to say anything. "When a defendant speaks after receiving *Miranda* warnings,

> a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of a right to remain silent." The trial court did not clearly err in concluding that defendant voluntarily waived his right to remain silent and that he did not subsequently invoke his right to silence. Defendant's statements were properly admitted into evidence.

J.A. 163-64 Mich. Ct. App. Op. at 1-2) (footnote and citations to Michigan case law omitted).

The state court's adjudication of Thompkins's Fifth Amendment claim both involved an unreasonable determination of the facts in light of the evidence presented and also unreasonably. applied clearly established federal law. That is, the state court's analysis failed to pay proper heed to the Supreme Court's holding that "[t]he courts must presume that a defendant did not waive his rights; the prosecution's burden is great." *Butler*, 441 U.S. at 373; see also *Miranda*, 384 U.S. at 475 ("[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination."). Furthermore, the record contradicts the finding that Thompkins "continued to talk with the officer, albeit sporadically." We consider the factual determination first, as it underlies the legal determinations.

The Michigan Court of Appeals's finding that Thompkins "continued to talk with the officer, albeit sporadically" lacks support in the record. Certainly, Helgert at one point testified that Thompkins "talk[ed] with us very sporadically," J.A. at 216 (Supp. Hr'g Tr. at 81), but Helgert identified essentially *no* specific statements that Thompkins made. At the suppression

hearing, Helgert testified that during the first two hours and forty-five minutes of the interrogation Helgert was "just repeating that theme [and b]eing really quite repetitious in the monologue, 'This is your opportunity to talk. What do you think is going to happen? Who is going to speak up for you if you don't speak tip for yourself' J.A. 233 (Supp. Hr'g Tr. at 98). When the prosecution asked Helgert how Thompkins responded to this monologue, Helgert offered vague testimony that "sometimes [Thompkins's response] would be eye-contact, sometimes it would be a nod of the head, sometimes, I know the words, 'I don't know' was quite prevalent," while also admitting that Thompkins "sat there and listened to our speech, if you will, most of the time." J.A. at 233, 234 (Supp. Hr'g Tr. at 98, 99). Helgert never identified any specific question or questions to which Thompkins made his "responses" of eye-contact, head nods, or use of the phrase "I don't know." Indeed, Helgert even admitted that when he tried his "spiritual tac[k] near the end of the interrogation, Thompkins then "made eye-contact with me *for one of the few times* that he did for the interview." J.A. at 218 (Supp. Hr'g Tr. at 83) (emphasis added). Helgert's testimony thus demonstrates that Thompkins rarely even made eye contact with the officers. At trial, Helgert stated that "I remember two things that he did say, he said 'He didn't want a peppermint' that my partner offered him and 'the chair that he was sitting in was hard." J.A. at 364 (Trial Tr. 5/16/2002 at 109).

Given that the above constituted the total of Thompkins's responses to the first two hours and forty-five minutes of the interrogation, the Michigan Court of Appeals's finding that Thompkins "talk[ed with the officer, albeit sporadically" simply misrepresents the record. Rather, Helgert's testimony demonstrates that the interrogation was "very, very one-sided," J.A. at 217 (Supp. Hr'g Tr. at 82), "nearly a

monologue," J.A. at 227 (Supp. Hr'g Tr. at 92), and that Thompkins was "uncommunicative," J.A. at 217 (Supp. Hr'g Tr. at 82), and "not verbally communicative," J.A. at 227 (Supp. Hr'g Tr. at 92). Most revealingly, *three times* Thompkins's counsel asked Helgert variations of a question regarding whether Thompkins remained silent during the first two-plus hours of the interrogation, and each time Helgert confirmed that Thompkins had done so. *See* J.A. at 229, 231,232 (Supp. Hr'g Tr. at 94, 96, 97).[5] Contrary to the state court's statement, the evidence demonstrates that Thompkins was silent for two hours and forty-five minutes. Indeed, the only evidence of Tl1ornpkins's participation consists of his declining a

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[5] Specifically, the first question asked Helgert whether "consistently. . . for two hours and fifteen (15) minutes every time you gave [Thompkins] an opportunity to participate meaningfully in the conversation he exercised his right to remain silent," and Helgert replied that "[l]argely he remained silent, that's correct." J.A. at 229 (Supp. Hr'g Tr. at 94). The second question asked Helgert whether Thompkins "exercised [his right to remain silent] continuously for two hours and forty-five (45) minutes in terms of substantive responses to your attempts to elicit statements regarding his offense, is that fair to say? and Helgert responded "[m]uch of the time. Most of the time, yes." J.A. at 231 (Supp. Hr'g Ti. at 96). Finally, the third question inquired whether Thompson's statements responding to Helgert's "spiritual tac[k] of questioning came "after [Thompkins] had consistently exercised his right to remain substantively silent for at least two hours and forty-five (45) minutes?," and Helgert answered "Yes, that's right." J.A. at 232 (Supp. Hr'g Tr, at 97).

peppermint, complaining about his chair, and occasionally nodding his head or responding "I don't know" to *unidentified* questions and these actions do not amount even to "sporadic" conversation with the officers. To disregard a state court's factual determination, "the state court's factual determination must be 'objectively unreasonable' in light of the evidence presented during the state proceedings," and this is such a case. *Dennis v. Mitchell*, 354 F.3d 511, 518 (6th Cir. 2003).

The state court also unreasonably applied clearly established federal law insofar as the court viewed such scant evidence of Thompkins's participation during the interrogation as demonstrating that Thompkins voluntarily waived his right to remain silent given the Supreme Court's command that "[t]he courts must presume that a defendant did not waive his rights; the prosecution's burden is great." *Butler*, 441 U.S. at 373; *see also Miranda*, 384 U.S. at 475 (stating that a "heavy burden rests on the government" to prove waiver). Helgert's vague testimony regarding Thompkins's "responses" during the interrogation—responses consisting of eye contact, head nods, declining a peppermint, complaining about his chair, and occasional statements of "I don't know"—does not suffice to meet the state's "great" burden of showing that Thompkins waived his right to remain silent. The Supreme Court's opinion in *Miranda* specifically addressed this *precise* issue: "*[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.*" *Miranda*, 384 U.S. at 475 (emphasis added); *see also United States v. Upton*, 512 F.3d 394, 399 (7th Cir. 2008) ("Waiver can never occur through 'mere silence,' as the *Miranda* warnings themselves indicate.") (citing *Butler* 441 U.S. at 373). In addition, Thompkins

refused to sign even the advice of rights form, which purports only to show a suspect's acknowledgment that officers had read the rights and not that the suspect was waiving the rights. The Supreme Court's opinion in Butler clearly permits implied waivers of *Miranda* rights, but a suspect's uncooperativeness or refusal to sign even an advice of rights form certainly has relevance to determining whether Thompkins waived his rights. *Butler*, 441 U.S. at 374 ("[T]he question of waiver must be determined on 'the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.") (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Had Helgert identified any particular exchange involving an instance of eye contact or a head nod, the issue of whether the prosecution had satisfied its "heavy burden" of showing "a course of conduct indicating waiver" would be entirely different. Helgert described his questioning as similar to a "monologue" propounding on the "theme" that this was Thompkins's opportunity to tell his side of the story. Crucially, Helgert described Thompkins's conduct throughout the first two and half hours of the interview as generally "shar[ing] very limited verbal responses with us," J.A. at 217 (Supp. Hr'g Tr. at 82), as "remain[ing] silent," J.A. at 229 (Supp. Hr'g Tr. at 94), and as "not very cooperative or responding," J.A. at 228 (Supp. Hr'g Tr. at 93). Helgert described Thompkins's "limited" conduct of making a "nod of the head" or a "yeah,' or a 'no,' or 'I don't know" without providing any context. J.A. at 236-37 (Supp. Hr'g Tr. at 101-02). Had Helgert testified that Thompkins nodded his head in response to a question asking whether Thompkins wanted his side of the story to be known, such testimony would obviously be powerful evidence of waiver; a head nod in response to a question asking whether Thompkins was comfortable declining to exercise his opportunity

to tell his side of the story (or a "no" to a question about whether Thompkins wished to tell his story) would present an entirely different situation. Without the context of Thompkins's occasional eye contact or head nods, we cannot say that Thompkins's conduct indicated a waiver of his rights; to the contrary refusing to sign even an advice of rights form, being "so uncommunicative," J.A. at 217 (Supp. Hr'g Tr. at 82), "remain[ing] silent," J.A. at 229 (Supp. Hr'g Tr. at 94), and "spen[ding] a lot of his time sitting . . . simply holding his head looking down," J.A. at 364 (Trial Tr. 5/16/2002 at 109), form a course of conduct that powerfully suggests Thompkins did *not* waive his rights.

Thompkins's conduct also contrasts markedly to the behavior of defendants in cases where courts have found implied waivers. For instance, in *United States v. Upton*, 512 F.3d 394, 399 (7th Cir. 2008), the Seventh Circuit found that the defendant "impliedly waived his *Miranda* rights before he confessed" even though "he did not sign an acknowledgment form" because the defendant "freely talk about the allegations against him, admitting they were true but attempting to strike a deal." The Seventh Circuit also stated that "[w]aiver can never occur through 'mere silence,' as the *Miranda* warnings themselves indicate." *Id.* Similarly, in *United States v. Younger*, 398 F.3d 1179, 1186 (9th Cir. 2005), the Ninth Circuit affirmed a district court's finding of "an implied waiver . . . based on evidence that after Officer Hall advised defendant of his *Miranda* rights but before questioning him, defendant made a spontaneous statement and responded to further questioning without reference to counsel." In *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000), the Fourth Circuit denied a certificate of appealability in a case in which the Virginia Supreme Court found an implied waiver given that the defendant "initiated a conversation" with the detective

and "stated that he understood his rights and wanted to talk to" the detective.

The case presenting perhaps the starkest contrast is *Bui v. DiPaola* 170 F.3d 232, 239 (1st Cir. 1999), the First Circuit case that the district court cited. In *Bui*, the First Circuit observed that courts "routinely" conclude that defendants have impliedly waived their rights in eases in which the "incriminating statements were made either as part of a 'steady stream' of speech or as part of a back-and-forth conversation with the police." *Bui*, 170 F.3d at 240 (internal citations omitted). The First Circuit concluded that the petitioner's interview "fit the implied waiver profile" because the record showed "a fairly standard two-way conversation with the authorities" in which the petitioner's conduct even included a "continuation of the conversation," asking the officers "who said I did this" when the officers inquired "whether he had something to say about the reasons for his arrest" in response to the petitioner's "boast[] that the police had nothing" on him. *Id.* at 240-41. The account of Helgert's interview with Thompkins bears no resemblance to the clear evidence in *Bui* of a back-and-forth conversation between the petitioner and the authorities, which included specific questions and answers. Indeed, the evidence in *Bui* demonstrated that the petitioner even asked questions; in contrast, as Helgert testified at trial, Thompkins "spent a lot of his time sitting . . .simply holding his head looking down," J.A. at 364 (Trial Tr. 5/16/2002 at 109). Helgert described the interview as "nearly a mon-logue," J.A. at 227 (Supp. Hr'g Tr. at 92), and as "very, very one-sided," J.A. at 217 (Supp. Hr'g Tr. at 82), an account that clearly establishes the interview was *not* "a fairly standard two-way conversation." *Bui*, 170 F.3d at 241.

As a result, we conclude that Thompkins did not waive his rights, and the Michigan Court of Appeals unreasonably applied clearly established federal law, namely *Miranda* itself and *Butler*, in concluding otherwise. The state failed to satisfy its "heavy burden" of showing that Thompkins's "course of conduct indicat[ed] waiver." *Butler*, 441 U.S. at 373. Indeed, Thompkins's persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights. *See United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988) (concluding that the defendant "did not waive her rights" when, " the face of repeated questioning by Agent Brehm, Wallace maintained her silence for several minutes and, perhaps, as many as ten minutes.").

In sum, we hold that the district court erred in denying Thompkins's petition for a writ of habeas corpus because the Michigan Court of Appeals's rejection of his Fifth Amendment claim "was based on an unreasonable determination of the facts in light of the evidence" and "involved an unreasonable application of clearly established Federal law." § 2254(d). Because we conclude that the Michigan Court of Appeals unreasonably applied clearly established federal law in determining that Thompkins waived his right to remain silent, we do not need to resolve whether the state court further unreasonably applied clearly established federal law in determining that Thompkins failed to invoke his right to remain silent by in fact remaining substantively silent for nearly three hours.

C. Thompkins's Prosecutorial Misconduct Claim

Thompkins argues that various instances of prosecutorial misconduct violated his Due Process Clause right to a fair trial. Pet'r Br. at 23-34. Thompkins's claim of prosecutorial misconduct centers upon the prosecution's offering "evidence of Purifoy's jury verdict and guilty plea conviction and of the aider and abettor charge against Purifoy." J.A. at 459 (Order Granting Certificate of Appealability at 3).

The warden argues that Thompkins has procedurally defaulted this claim because he failed to object contemporaneously to the instances of prosecutorial misconduct and the Michigan Court of Appeals reviewed this claim for plain error. Resp't Br. at 25 (citing *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 423-34 (6th Cir. 2003); *see also Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000) (noting that "[c]ontrolling precedent in our circuit indicates that plain error review does not constitute a waiver of state procedural default rules"). The warden further notes that Thompkins's appellate brief failed to argue for the existence of cause and prejudice to excuse his procedural default. Resp't Br. at 25. In his Reply Brief, Thompkins did include a brief section asserting that his arguments relating to his ineffective-assistance-of-counsel claim sufficiently demonstrated cause and prejudice for the failure to preserve his claim of prosecutorial misconduct. Pet'r Reply Br. at 2-3.

In ruling on Thompkins's prosecutorial-misconduct claim, the district court noted the warden's argument that the claim was procedurally defaulted but elected to consider the merits "[g]iven that the cause and prejudice inquiry for the procedural default issue merges with an analysis of the merits of [Thompkins's] ineffective assistance of counsel claim." J.A. at 184 (Op. at 11 n.3). Although Thompkins's

failure to set forth an explicit argument regarding cause and prejudice until his Reply Brief is troubling in light of this clear notice that the warden had already asserted that his prosecutorial-misconduct claim was procedurally defaulted, we follow the district court in considering the merits of Thompkins's prosecutorial-misconduct claim given the overlapping analysis. We also conclude that Thompkins is not entitled to relief on this claim.

1. Clearly Established Federal Law Regarding Prosecutorial Misconduct

"On habeas review, [t]he relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the conviction a denial of due process." *Bates v. Bell*, 402 F.3d 635, 640-41 (6th Cir. 2005) (quotation omitted). Therefore, "to obtain relief, [Thompkins] must demonstrate that the prosecution's conduct was both improper and so flagrant as to warrant reversal." *Id.* at 641. We consider four factors "in determining whether the challenged conduct is flagrant: (1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the defendant." *Id.* Finally, "[c]laims of prosecutorial misconduct are reviewed deferentially on habeas review." *Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004).

2. The State Court's Adjudication of Thornpkins's Prosecutorial-Misconduct claim.

The Michigan Court of Appeals applied plain-error review to Thompkins's claim of prosecutorial

misconduct because of his failure to lodge contemporaneous objections. J.A. at 164-65 (Mich. Ct. App. Op. at 2-3). The state court recognized that it was "improper for the prosecution to introduce evidence of codefendant Purifoy's conviction," but it concluded that Thompkins's "substantial rights were not affected because the defense asserted that Purifoy was the shooter and that the evidence of Purifoy's conviction [on firearm charges] linked Purifoy to the gun." J.A. at 164 (Op. at 2). As a result, the court of appeals apparently believed that the evidence that Purifoy had been convicted of possessing a firearm on that date would bolster Thompkins's attempts to pin the murder on Purifoy, despite the evidence that Purifoy's jury had acquitted him of the murder charges.

The district court agreed with the state court that "[t]he testimony regarding the outcome of Purifoy's trial was improper and should not have been admitted." J.A. at 186 (Op. at 13). However, the district court noted that "if the defendant's accomplice testifies at trial, evidence of the accomplice's convictions may be introduced so the jury can assess his credibility," so long as the trial court instructs the jury "that it may not consider the accomplice's conviction as evidence of the defendant's guilt." J.A. at 186-87 (Op. at 13-14). Even though Purifoy testified and the trial court failed to give the jury such a cautionary instruction, the district court denied Thompkins's prosecutorial-misconduct claim because it did not believe that the introduction of such evidence rendered the entire trial fundamentally unfair. *Id.*

We agree with the district court's analysis and affirm the denial of Thompkins's prosecutorial-misconduct claim on this ground. The true cause for concern is not necessarily that the prosecutor elicited such evidence of an accomplice's conviction—as the district court noted, evidence of an accomplice's

conviction is admissible to evaluate the witness's credibility—but rather the failure of the trial court to instruct the jury on the proper use of the evidence (and the failure of defense counsel to request such an instruction). It was not wholly illegitimate and improper for the prosecution to introduce evidence of Purifoy's convictions, and the error that occurred from this introduction stem not from the prosecutor's actions but instead from the failure of Thompkins's counsel to request, and the trial court's failure to give, a cautionary instruction to the jury. That is, although an error or misconduct occurred, the parties responsible for that error are Thompkins's attorney and the trial judge, not the prosecutor. Accordingly, Thompkins's claim of prosecutorial misconduct lacks merit.

D. Thompkins's Ineffective-Assistance Claim

Thompkins argues that he received ineffective assistance of counsel because his attorney failed to request that the trial court instruct the jury that it could consider the evidence of Purifoy's jury trial and guilty pleas only in assessing Purifoy's credibility and not as substantive evidence of Thompkins's guilt. Pet'r Br. at 36. We conclude that the district court erred in denying Thompkins's ineffective-assistance-of-counsel claim and that Thompkins is entitled to habeas relief on this ground as well.

1. Clearly Established Federal Law Regarding Ineffective Assistance of Counsel

The standard for establishing ineffective assistance of counsel requires that a defendant (1) "show that counsel's representation fell below an objective standard of reasonableness" and (2) that a defendant show prejudice, i.e., that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Further, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

2. The State Court's Adjudication of Thompkins's Ineffective Claim

That Thompkins has satisfied the first prong of his ineffectiveness claim—deficient performance—is clear. Although the warden contends that "failure to ask for [a limiting] instruction was sound trial strategy," Resp't Br. at 30, the Michigan Court of Appeals appeared to accept that counsel's failure to request a limiting instruction was error and simply denied Thompkins ineffectiveness claim because it found a lack of prejudice because "the record does not disclose an attempt to argue [Purifoy's] conviction for an improper purpose," that is, for a purpose other than an effect on Purifoy's credibility. J.A. at 166 (Mich. Ct. App. Op. at 4). Likewise, the district court agreed with Thompkins "that effective counsel would have requested such [a limiting] instruction." J.A. at 197 (Op. at 24). Indeed, the failure to request such a limiting instruction is particularly deficient in light of Thompkins's primary defense at trial, which was "that Eric Purifoy was the shooter and that defendant was merely present." Pet'r Br. at 7. The district court noted Thompkins's argument that "he was extraordinarily prejudiced by the introduction of this testimony [relating to Purifoy's trial and convictions] because his defense was that Purifoy was the shooter. As [Thompkins] raises: '[i]f Purifoy found him not guilty who did that leave as the shooter?" J.A. at 185 (Op. at 12).

We hold that Thompkins has satisfied the second prong of his ineffectiveness claim as well.

Although the district court found that the performance of Thompkins's counsel was deficient, the court denied Thompkins's claim because "the Court [did] not believe that the introduction of evidence regarding Purifoy's convictions rendered [Thompkins's] trial fundamentally unfair." J.A. at 197 (Op. at 24). Rendering the trial "fundamentally unfair," however, is not the standard used to evaluate a claim of ineffective assistance; under *Strickland*, the required showing is prejudice, measured as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Given that Thompkins's *central strategy* at trial involved pinning the blame on Purifoy, that his jury heard evidence—from *multiple* witnesses, J.A. at 345-47 (Trial Tr. 5/16/2002 at 85-87) (Helgert); J.A. at 289 (Trial Tr. 5/13/2002 at 237) (France); J.A. at 401 (Trial Tr. 5/16/2002 at 188) (Purifoy)—that Purifoy had been acquitted of murder likely exerted a powerful influence on the jury to convict Thompkins of murder. If the jury did not convict Thompkins, the jury knew that no one would be convicted for killing Morris and shooting France. Most importantly, in the absence of a limiting instruction, the jury could well have believed that it was entirely proper to weigh Purifoy's acquittal as significant evidence that Thompkins must have been the shooter. In fact, the trial court's jury instructions included the statement that "[y]ou may convict the defendant based only on the accomplice testimony, if you believe the testimony and it proves the Defendant's guilty beyond a reasonable doubt." J.A. at 443 (Trial Tr. 5/17/2002 at 166) (emphasis added). The jury thus heard that it could convict Thompkins based solely on Purifoy's testimony, which included not only his account of the shooting but also his statement that he had been acquitted of murder.

Although we have concluded that the district court erred in denying Thompkins's ineffective-assistance-of-counsel claim, on habeas review Thompkins of course bears the additional burden of "show[ing] that the [Michigan] Court of Appeals applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 699 (2002). We hold that Thompkins has satisfied this burden as well.

The Michigan Court of Appeals applied *Strickland* in an objectively unreasonable manner in this case because its analysis of prejudice was fundamentally flawed. The Michigan Court of Appeals appeared to acknowledge that Thompkins's counsel erred and was deficient in failing to request a limiting jury instruction regarding the evidence of Purifoy's trial verdicts, but it rejected Thompkins's claim because "the record does not disclose an attempt to argue [regarding Purifoy's] conviction for all improper purpose." J.A. at 166 (Mich. Ct. App. Op. at 4). Questions of the prosecution's purpose or intent are completely irrelevant in an analyzing whether an error resulted in prejudice, which by definition concerns the error's effect upon the outcome. *Strickland*, 466 U.S. at 696 ("[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the *decision reached* would reasonably likely have been different absent tile errors.") (emphasis added). Even if the prosecution intended that the evidence regarding Purifoy's jury trial outcome be considered only as it pertained to Purifoy's credibility, the prosecutor's intent does not cure the problem that a reasonable probability exists that the jury understood Purifoy's acquittal as powerful evidence that Thompkins, tile only other individual in the front seat of the van, must have been the shooter.

In denying Thompkins's ineffective-assistance claim on the ground that the prosecution did not introduce evidence relating to Purifoy's jury trial "for an improper purpose," the Michigan Court of Appeals applied the prejudice prong of the Strickland analysis in an objectively unreasonable manner. We therefore conclude that Thompkins is entitled to relief on his claim of ineffective assistance of counsel.

III. CONCLUSION

For the reasons discussed above, we **AFFIRM** the district court's denial of Thompkins's petition for a writ of habeas corpus as to his claim of prosecutorial misconduct, but we **REVERSE** the judgment of the district court denying relief as to his Fifth Amendment and ineffective- assistance-of-counsel claims and **REMAND** the case with instructions that the district court order that Thompkins be released from state custody unless the State of Michigan commences a new trial within 180 days of the final federal-court judgment in this case.

No. 06-2435
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 24, 2009
LEONARD GREEN, Clerk

VAN CHESTER THOMPKINS, JR.,

Petitioner-Appellant,

v.

MARY BERGHUIS, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: MOORE, CLAY, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/Leonard Green

Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VAN CHESTER THOMPKINS, Jr.

Petitioner,

v.

CASE NO. 05-CV-70188-DT
Honorable Patrick J. Duggan

MARY BERGHUIS,

Respondent.
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan on September 28, 2006.

Present: THE HONORABLE PATRICK J. DUGGAN U.S. DISTRICT COURT JUDGE

Petitioner Van Chester Thompkins, Jr., ("Petitioner"), presently confined at the Brooks Correctional Facility in Muskegon Heights, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his application, filed by his attorney, Petitioner challenges his conviction on one count of first-degree murder, MICH. COMP. LAWS ANN. § 750.316; one count of assault with intent to commit murder, MICH. COMP. LAWS ANN. § 750.83; three counts of possession of a firearm in the commission of a felony, MICH. COMP. LAWS ANN. § 750.227b; one count of felon in possession of a firearm, MICH. COMP. LAWS ANN. § 750.224f; and one count

of carrying a concealed weapon in a motor vehicle, Mid. COMP. LAWS ANN. § 750.227. For the reasons stated below, the petition for writ of habeas corpus is DENIED.

On May 20, 2002, Petitioner was convicted of fatally shooting Samuel Morris and wounding Frederick France on January 10, 2000, in Southfield, Michigan. The trial court sentenced Petitioner on June 4, 2002. His conviction and sentence were affirmed on appeal. *People v. Thompkins*, No. 242478 (Mich. Ct. App. Feb. 3, 2004). The Michigan Supreme Court denied Petitioner's request for leave to appeal. *People v. Thompkins*, No. 125667 (Mich. July 29, 2004). Petitioner filed the pending writ of habeas corpus on January 19, 2005.

Petitioner raises the following claims in support of his request for habeas corpus relief:

I. Prosecutorial misconduct denied Petitioner due process of law in the following ways:

   a. The prosecutor offered evidence of Petitioner's co-defendant's jury verdict and guilty plea conviction, offered evidence of an uncharged acquaintance's unrelated bad acts, and offered opinion evidence on the guilt of the Petitioner.

   b. The prosecutor elicited evidence of Petitioner's exercise of his right to remain silent and of his right to counsel and he denigrated counsel.

c. The prosecutor's questioning of Tomika Stephens and of Detective Helgert concerning Petitioner's one-year absence from the jurisdiction was improper where its effect both explicitly and implicitly was to offer evidence that Petitioner had committed crimes other than the ones for which he was on trial.

d. The prosecution offered unfairly prejudicial information by circumventing the rules of evidence in pretending to use the Purifoy letters for impeachment.

e. The prosecution argued facts not in evidence.

f. The prosecutor asked the jury to sympathize with the mother of the deceased.

g. The prosecution shifted the burden of proof to the defense in the rebuttal argument.

II. Petitioner was denied the effective assistance of counsel where trial counsel failed to object to prosecutorial misconduct which included a trial-long effort to convict Petitioner based on guilt by association. The trial court clearly err when it denied appellant's request for an evidentiary hearing on this issue.

III. Where petitioner remained mute for three hours after being informed of his Miranda rights and where he refused to sign the rights form, he was unequivocally exercising his Fifth Amendment privilege against self-incrimination. The answers given at the very end of that time period were elicited in violation of the Due Process Clause and also in violation of Miranda v. Arizona.

IV. The trial court erred in denying the motion to suppress Frederick France's in-court and out-of-court identification of Petitioner as the shooter.

Respondent filed an answer to the Petition on July 26, 2005.

Factual Background

At Petitioner's trial, Frederick France, one of the victims of the shooting on January 10, 2000, testified that he was driving in Southfield, Michigan, at around 9:00 p.m., with Samuel Morris, the decedent. Morris drove into the parking lot of a strip mall. Three to four males exited Lou's Deli, a restaurant located in the strip mall, and crossed to the parking lot in front of France's and Morris' car. Morris stopped to let the men pass. One of the men, later identified as Petitioner, was staring at Morris and France. Petitioner continued to stare at Morris and France as he walked backwards toward a van, which was white and blue with gold rims. France and Morris exited their vehicle and France yelled at Petitioner: "What you all looking at?" Petitioner or one of the other men with him yelled back: "What the f-ck you're looking at." Morris and France then returned to their car and began to drive away.

France then noticed the blue and white van approaching them. When Morris stopped his car, the van drove past. The driver of the van then backed up so the passenger's side window of the van was even with the driver's side window of Morris' car. The vehicles were approximately four feet apart. The passenger side window of the van was open. France identified Petitioner as the front seat passenger of the van and Eric Purifoy as the driver of the van.

At that point, Petitioner said to France and Morris, "What you say, big dog?" Petitioner then pulled out a gun and began firing into the driver's side window of Morris' car. France ran from the car, but was hit by several bullets as he tried to escape. France testified that he had no doubt that Petitioner was the passenger of the van and the individual who fired the shots.

Omar Stephens, who testified that he was Petitioner's friend, told the jury that about a month after the shooting, Petitioner told him that "he had to pop them niggers up." Stephens knew that Petitioner drove a van and carried a black and gold .45 caliber gun. Detective Christopher Helgert of the Southfield Police testified that shell casings found at the crime scene were from a .45 caliber gun. According to Stephens, Petitioner told him that he had to get rid of the van, but that before he did, he removed and sold the van's rims and stereo. When the police recovered the van, it was missing the gold rims and stereo. Stephens admitted that he had been convicted of armed robbery in 1999. Stephens also admitted that he only informed the police about Petitioner's statements to him after the Detroit Police arrested him in a drug case.

Petitioner eventually was arrested on February 19, 2001, in Ohio. Ben Damschroder, a police officer in

Ohio, testified that he and other officers were dispatched to a car dealership in Meflen Township, Ohio, to arrest a homicide suspect. Prior to arriving at the dealership, Damschroder received a description of the vehicle Petitioner would be driving. Eventually, Damschroder observed the vehicle leave the dealership lot, followed by another vehicle. Damschroder followed the vehicles as they entered a parking lot about two hundred feet away from the dealership. Two individuals then exited each vehicle, As Damschroder did not have a description of Petitioner at that time, he ordered all four individuals to the ground. Petitioner fled the area on foot, but subsequently was seized.

James Parrish, a police officer from Clinton Township, Ohio, assisted in Petitioner's arrest. Parrish recovered three types of identification from Petitioner, all of which contained names other than Van Chester Thompkins. Petitioner told the police that his name was Detniuan Ishia Reed. Officers from the Federal Bureau of Investigation who arrived on the scene did not believe that Petitioner was the homicide suspect because he did not look exactly like the picture on the suspect's "Wanted" poster and therefore they decided not to take him into custody. Parrish, however, believed that Petitioner was the wanted suspect, particularly as Petitioner responded to Parrish when he called him "Van." Parrish therefore arrested Petitioner for obstruction based on his failure to obey Damschroder's commands to stop.

On the third day of Petitioner's trial, Eric Purifoy also testified. Prior to his testimony, the prosecutor moved to exclude several letters that Purifoy allegedly wrote to Petitioner based on the fact that defense counsel only produced them the preceding day. In response to the prosecutor's motion, defense counsel claimed that he had not decided whether to introduce the letter and that he only received the

letters himself the night before Petitioner's trial began. The letters subsequently were introduced into evidence without objection, with a statement read to the jury concerning their production.[1]

During his testimony, Purifoy described himself as an acquaintance of Petitioner and a friend of Myzell Woodward. Purifoy testified that on the day of the shooting, he, Woodward, and Petitioner went to Lou's Deli in Petitioner's van. After the three men finished eating, they walked outside.

According to Purifoy, he, Woodward, and Petitioner crossed in front of a red car as they walked toward Petitioner's van. The three men then got into the van; Purifoy drove, Petitioner sat in the front passenger seat, and Woodward sat in a rear seat. As they drove toward the exit of the parking lot, Purifoy noticed the passenger of the red car standing outside the car making gestures. Purifoy drove the van past the red car but then Petitioner told him to stop because "they had said something." Purifoy then backed up the van to where the red car was stopped. Purifoy heard someone say something and then heard gunshots. Purifoy ducked down into his seat and claimed that Petitioner did the same. Purifoy testified that he heard Petitioner say "what's up" and that when Purifoy sat back up in his seat, he saw Petitioner with a small; black, semi-automatic weapon. According to Purifoy, Petitioner then asked Purifoy "what the hell you doing" and ordered him to "pull off." Purifoy was unaware that anyone had been shot.

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[1] The prosecutor's motion was resolved off-the-record and it is not clear who prepared the statement read to the jury; although as Petitioner refers to the statement as a "stipulation," the Court assumes that it as least was agreed to by both parties.

Purifoy was charged with first-degree murder, assault with intent to murder, and several weapons offenses arising from the January 10 shooting. At a separate jury trial, prior to Petitioner's trial, Purifoy was acquitted of the murder and assault charges but convicted of several weapons offenses. He subsequently pleaded guilty to additional weapons offenses arising from the incident. Purifoy was not given immunity for his testimony in Petitioner's case.

Southfield Police Detective Christopher Helgert testified regarding his and his partner's interrogation of Petitioner following his arrest in Ohio. According to Helgert, Petitioner first was read his Miranda warnings. Petitioner neither requested an attorney nor indicated that lie did not want to talk to the officers. The officers spoke to Petitioner for approximately two hours and forty-five minutes. Helgert and his partner did most of the talking; Petitioner occasionally responded only saying "yeah," "no," or "I don't know." Helgert testified that towards the end of the interview, he asked Petitioner if he prayed to God. Helgert testified that Petitioner said "yes" and that his demeanor changed at this point in that lie looked directly at Helgert with moistened eyes. Helgert then asked Petitioner: "Do you pray to God to forgive you for shooting that boy down?" Helgert testified that Petitioner answered "yes" and then looked down. The interview ended shortly thereafter. During his testimony, in response to a question by Petitioner's counsel, Helgert stated: "I am absolutely convinced and am now that your client was there."

Helgert also testified that, prior to interviewing Stephens, the police had not disseminated to the public any information concerning the type of weapon used in the January 10 shooting. Helgert acknowledged that Stephens gave his statement to the police only after he had been arrested and detained on

a drug charge in Detroit. Helgert denied making any promises to Stephens in exchange for his testimony.

Standard of Review

The Antiterrorism and Effective Death Penalty Act ("AEDPA" provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In short, a federal court is bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. *Franklin v. Francis*, 144 F.3d 429 (6th Cir. 1998). The federal court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(l)[2] see also *Cremeans v. Chapleau*,

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[2] 28 U.S.C. § 2254(e)(l) provides, in pertinent part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody

62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases.
>
> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 1519-20 (2000).

With respect to the "unreasonable application" clause of Section 2254(d)(1), the United States Supreme Court has instructed that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of [the Supreme] Court to the facts of a prisoner's case." *Id.* at

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> pursuant to the. judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

409, 120 S. Ct. at 1521. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law Under § 2254(d)(l)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 410-11, 120 S. Ct. at 1521-22.

Discussion

Petitioner's Prosecutorial Misconduct Claims

Petitioner alleges that he was deprived of a fair trial because of prosecutorial misconduct.[3] When a

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[3] Respondent contends that Petitioner's prosecutorial misconduct claims are procedurally defaulted because he failed to object to the alleged prosecutorial misconduct at trial and the Michigan Court of Appeals relied on his failure to object as a basis to reject the claims. In the second issue raised in

petitioner seeking habeas relief makes a claim of prosecutorial misconduct, the reviewing court must consider that "the touchstone of due process . . is the fairness of the trial, not the culpability of the prosecutor." *Serra v. Michigan Dep't of Corr,* 4 F.3d 1348, 1355-56 (6th Cir. 1993) (quoting Smith Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 947 (1982)). On habeas review, a court's role "is to determine whether the [prosecutor's] conduct was 'so egregious so as to render the entire trial fundamentally unfair.'" *Id.* (quoting *Cook v. Borden Kircher,* 602 F.2d 117, 119 (6th Cir. 1979). When analyzing a claim of prosecutorial misconduct, a court initially must decide whether the challenged statements were improper. *Boyle v. Million,* 201 F.3d 711,717 (6th Cir. 2000). If the conduct is improper, the district court then must examine whether the statements or remarks are so flagrant as to constitute a denial of due process and warrant granting a writ. *Id.* In evaluating prosecutorial misconduct in a habeas case, consideration should be given to the following: (a) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (b) whether the remarks were isolated or

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his petition, Petitioner claims that his trial counsel was ineffective for failing to object to the prosecutorial misconduct. Ineffective assistance of counsel may establish cause for procedural default. *Edwards v. Carpenter,* 529 U.S. 446, 45 1-52, 120 S. Ct. 1587, 1591 (2000). Given that the cause and prejudice inquiry for the procedural default issue merges with an analysis of the merits of Petitioner's ineffective assistance of counsel claim, the Court finds it easier to simply consider the merits of his prosecutorial misconduct claim. See *Cameron v. Birkett,* 348 F. Supp. 2d 825, 836 (E.D. Mich. 2004).

extensive; (c) whether the remarks were deliberately or accidentally placed before the jury; and, (d) the strength of the competent proof to establish the guilt of the accused. *Serra*, 4 F.3d at 1355-56 (citation omitted).

Petitioner first contends that the prosecutor improperly and on several occasions elicited evidence of the jury verdict in Purifoy's case. Petitioner contends that he was extraordinarily prejudiced by the introduction of this testimony because his defense was that Purifoy was the shooter. As Petitioner raises: "[i]f Purifoy's jury found him not guilty who did that leave as the shooter?" In other words, Petitioner suggests that evidence of the jury's verdict in Purifoy's case diluted the presumption of Petitioner's innocence. Petitioner argues that there was no legitimate basis for offering this evidence.

Second, Petitioner contends that he was prejudiced by testimony indicating that Purifoy had been charged as an aider and abettor in the January 10 shooting. Petitioner explains that such information bolstered Purifoy's testimony that Petitioner, not Purifoy, was the shooter. Petitioner complains that this point was bolstered by Helgert's testimony that the prosecutor's warrant for Purifoy was issued on an aiding and abetting theory. Applying the plain error rule, the Michigan Court of Appeals rejected these allegations of prosecutorial misconduct, explaining:

> To the extent it was improper for the prosecutor to introduce evidence of codefendant Purifoy's criminal conviction, see *People v. Lytal*, 415 Mich. 603, 612; 329 N.W.2d 738 (1982), defendant's substantial rights were not affected because the defense asserted that Purifoy was the shooter and that the evidence of

> Purifoy's conviction linked Purifoy to the gun.

People v. Thompkins, No. 242478, at 2 (Mich. Ct. App. Feb. 3, 2004) (unpublished opinion).

The testimony regarding the outcome of Purifoy's trial was improper and should not have been admitted. The jury in Petitioner's case learned not only that Purifoy was found guilty of possessing a gun, but also that Purifoy was acquitted of the first degree murder and assault charges. Thus while evidence of Purifoy's conviction on the gun charges linked him to the gun, as the state court noted, the jury's acquittal of Purifoy with respect to the murder and assault charges further suggested that he nevertheless was not the shooter. In other words, having learned that Purifoy was convicted on the weapons charges but acquitted on the murder and assault charges, the jury in Petitioner's case may have assumed that it was settled that there was a gun(s) in the van with Petitioner, Purifoy, and Woodward, and that someone in the van— but not Purifoy— pulled the trigger.

With respect to Purifoy's convictions, such evidence "is generally inadmissible, because it might lead the jury to 'regard the issue of the remaining defendant's guilt as settled and [conclude that] the trial is a mere formality." *United States v. Modena*, 302 F.3d 626, 631 (6th Cir. 2002) (quoting *United States v. Griffin*, 778 F.2d 707, 711 (11th Cir. 1985)). However, if the defendant's accomplice testifies at trial, evidence of the accomplice's convictions may be introduced so the jury can assess his credibility. *Id.* The trial court, however, must instruct the jury that it may not consider the accomplice's conviction as evidence of the defendant's guilt. *Id.* Purifoy testified at Petitioner's trial, but the trial court failed to give the jury this cautionary instruction. Nevertheless, this

Court believes the introduction of evidence regarding the outcome of Purifoy's trial did not "render the entire trial fundamentally unfair" in light of the overwhelming evidence identifying Petitioner, rather than Purifoy, as the shooter. *United States v. Wiedyk*, 71 F.3d 602, 607-08 (6th Cir. 1995).

Petitioner next claims that the prosecutor improperly elicited testimony from Purifoy that Woodward—one of the individuals in the van at the time of the shooting—subsequently was charged with murder in Ohio and faced the death penalty. Petitioner argues that this testimony was not relevant and lacked any probative value. On the other hand, Petitioner contends that the testimony suggested to the jury that he associates with unsavory characters and therefore must be guilty of the crimes charged. Petitioner argues that he was further prejudiced by this testimony when the prosecutor repeatedly asked his girlfriend, Tomika Stephens, why Petitioner was in Ohio. Petitioner believes that this inquiry suggested to the jury that that he somehow was involved in Woodward's crime.

The Michigan Court of Appeals rejected Petitioner's claims concerning the above testimony, stating: ". . . the evidence did not show that codefendant Woodward was convicted in this matter." By focusing on a conviction related to the incident on January 10—rather than Woodward's murder charge in Ohio—the state court apparently misunderstood Petitioner's argument. Nevertheless, this Court finds that the evidence was admissible as it was relevant to establish that Purifoy had a motive for lying and the probative value of the evidence did not unduly prejudice Petitioner so as to deprive him of a fair trial. As Respondent explains, the prosecutor asked Purifoy about Woodward's murder charge and the potential sentence Woodward faced on that charge in order to

impeach Purifoy's claim that Woodward was the shooter. The government wanted to show that Purifoy was blaming Woodward because he knew that Woodward would have nothing to lose if he were held responsible for the January 10 shooting.

Petitioner further contends that the prosecutor improperly elicited Helgert's opinion that he is "absolutely convinced and was then that [Petitioner] was there [the shooting]" and improperly bolstered the officer's credibility by obtaining his statement that " ultimate role as an investigator is to seek the truth" Helgert's statements, however, were not elicited by the prosecutor but instead were responses to defense counsel's cross-examination.

Petitioner also claims that the prosecutor improperly elicited evidence that Petitioner exercised his right to remain silent when he was interviewed by the police following his arrest. Because this claim is interrelated with Petitioner's third claim, infra, the Court will address this prosecutorial misconduct claim when addressing that claim.

Petitioner next contends that the prosecutor denigrated defense counsel in his closing arguments. It is improper for an attorney to make "unfounded and inflammatory attacks" on opposing counsel. *United States v. Young*, 470 U.S. 1, 9, 105 5. Ct. 1038, 1043 (1985). Nevertheless, ". . . a prosecutor's statements [about opposing counsel] must be viewed in context." *United States v. Catlett*, 97 F.3d 565, 572 (D.C. Cir. 1996). When viewed in context, the Court does not view the prosecutor's statements in Petitioner's case as attacks on the credibility or motive of defense counsel. For example, the Court does not read the prosecutor's statement concerning the surveillance tape at Lou's Deli as suggesting that defense counsel would have concocted a different story if there were no

such tapes and thus no indisputable evidence establishing Petitioner's presence at the deli before the shooting. Instead, the Court reads the prosecutor's comment as suggesting that Petitioner would have denied being at the scene but for the videotape establishing otherwise. To the extent any statements did denigrate defense counsel, however, the Court finds the comments harmless.

Petitioner claims that the prosecutor improperly questioned witnesses about Petitioner's one year absence from Michigan and his activities during that period, thereby suggesting that Petitioner was involved in other unspecified crimes in different states during that time. Petitioner further contends that testimony regarding efforts to find him after the shooting that referred to searches through the records of different police departments suggested to the jury that he may have been convicted of or charged with crimes in those jurisdictions.

Under Michigan and Federal law, flight is relevant to consciousness of guilt. *Brown v. Palmer*, 441 F.3d 347, 352 (6th Cir. 2006); *Johnson v. Burke*, 903 F.2d 1056, 1062 (6th Cir. 1990) (citing *People v. Mindeman*, 157 Mich. 120, 121-22, 121 N.W. 488, 489-90 (1909) and *People v. Stull*, 127 Mich. App. 14, 17, 338 N.W.2d 403, 406 (1983)). Because evidence concerning Petitioner's flight to Ohio and possibly to several other states was admissible to show his consciousness of guilt, the prosecutor did not engage in prosecutorial misconduct by admitting such evidence. Helgert's brief remark that the Michigan officers looked at documents from other police departments that contained information about Petitioner did not inform the jury that Petitioner had prior convictions in other states and it would be purely speculative to conclude that the jury made such an assumption based on this testimony. In any event, the Court finds

Helgert's limited testimony on this issue harmless in light of the overwhelming evidence of Petitioner's guilt in this case.

Petitioner next contends that the prosecutor offered unfair prejudicial information when it introduced into evidence the letters Purifoy wrote to Petitioner. According to Petitioner, he was prejudiced by the admission of the letters because they allowed the prosecution to introduce the fact that he was incarcerated while awaiting trial, informed the jury that Woodward possibly was facing the death penalty in Ohio, and suggested that Petitioner and Purifoy concocted Petitioner's defense. As an initial matter, the Court notes that it was the defense that first proposed introducing Purifoy's letters. In any event, the admission of the letters did not violate Petitioner's rights.

The Court already has addressed the evidence regarding Woodward's charges in Ohio. As to Petitioner's incarceration while awaiting trial, as there was no suggestion that Petitioner was incarcerated for a prior conviction, any fleeting reference to that fact did not render his trial fundamentally unfair. See e.g. *Tolbert v. LeCureaux*, 811 F. Supp. 1237, 1244 (E.D. Mich. 1993). With regard to Petitioner's assertion that the letters were inadmissible because they suggested that he and Purifoy concocted or "cooked up" his defense, Purifoy's statements in ins letters provided the prosecutor with a good faith basis to believe that Purifoy and Petitioner were discussing possible defenses in their correspondences. Clearly this evidence was admissible to impeach Purifoy's credibility. [I]t is certainly within the bounds of fair advocacy for a prosecutor, like any lawyer, to ask the jury to draw inferences from evidence that the prosecutor believes in good faith might be true." *Shaw v. Terhune*, 380 F.3d 473, 480 (9th Cir. 2004) (quoting

United States v. Blueford, 312 F.3d 962, 968 (9th Cir, 2002)). Thus the admission of the letters did not violate Petitioner's rights. See e.g. *United States v. Smith*, 982 F. 2d 681, 683 (1st Cir. 1993) (prosecutor's statement that the witness and the defendant had "concocted" their story was proper because it suggested inferences that the jury could draw from the conflicting evidence).

Petitioner next contends that the prosecutor argued facts not introduced into evidence when he argued that Purifoy and France, before knowing what the other would say, identified Petitioner as the passenger of the vehicle and Purifoy as the driver. Petitioner contends that this was misleading because Purifoy in fact previously heard France's testimony at Purifoy's preliminary examination and trial. Well before that time, however, when first contacted by the police, Purifoy admitted that he "might have been there" but was not the shooter. When interviewed by the police the day after the shooting, France identified Purifoy as the driver and Petitioner as the shooter. Thus the prosecutor's argument was supported by facts in evidence. In any event, the trial judge instructed the jury that the arguments of counsel were not evidence.

Petitioner next claims that the prosecutor attempted to garner sympathy for the victim and the victim's mother. The Michigan Court of Appeals agreed that the prosecutor made an improper appeal to sympathy in his opening statement, but found that the misconduct did not deprive Petitioner of a fair trial. This Court agrees, as the remark was brief and isolated and the trial court subsequently instructed the jury that it could not let sympathy influence its decision. See *Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir. 2000).

Finally, Petitioner contends that the prosecutor shifted the burden of proof in his rebuttal argument. Having reviewed the prosecutor's argument, the Court does not believe this to be true. Nevertheless, any possible prejudice resulting from the prosecutor's comments was cured by the trial court's instructions regarding the proper burden of proof. See *Scott v. Elo*, 302 F.3d 598, 603-04 (6th Cir. 2002).

In short, Petitioner fails to show that he was deprived of a fair trial because of prosecutorial misconduct. The Court therefore concludes that he is not entitled to habeas relief based on his first claim.

Ineffective Assistance of Counsel

Petitioner claims that he was deprived the effective assistance of counsel. The federal courts apply a two-part test to evaluate ineffective assistance of counsel claims:

> First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 666, 687, 104 S. Ct. 2052, 2064 (1984). In assessing counsel's performance, courts must consider "whether 'counsel's representation fell below an objective standard of reasonableness,' as measured by 'prevailing professional norms." *Rickman v. Bell*, 131 F.3d 1150, 1154 (6th Cir. 1997) (quoting Strickland, 466 U.S. at 687-88, 104 S. Ct. at 2064-65). There is a strong presumption that counsel's behavior lies within the

wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. "To establish prejudice, a defendant must demonstrate a reasonable probability that 'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Rickman*, 131 F.3d at 1155 (quoting *Strickland*, 466 U.S. at 694, 104 5. Ct. at 2068).

Petitioner first contends that his counsel was ineffective in that he failed to object to the prosecutorial misconduct described in his first claim. Because this Court has concluded that the claimed misconduct did not prejudice Petitioner, Petitioner's claim that counsel rendered ineffective assistance of counsel by failing to object to the prosecutor's conduct and remarks also must be rejected.

Petitioner next contends that his trial counsel improperly entered into two stipulations that were read to the jury. The first stipulation blamed Petitioner for failing to produce Purifoy's letters prior to trial, in violation of the trial court's discovery order. The second stipulation related to Petitioner's prior felony conviction as relevant to his felon in possession charge.

As referred to earlier, Purifoy wrote Petitioner several letters while the two were incarcerated. Petitioner and Respondent acknowledge that the letters strongly suggest that Purifoy was a complete liar. In the prosecution's request for discovery, filed July 3, 2001, the prosecution requested *inter alia* "any written or recorded statements by lay witnesses" and "any document, photograph or other paper that the defendant intends to introduce at trial." These requests were submitted by the prosecutor in accordance with the mandatory disclosures required under Michigan Court Rule 6.201(A). Purifoy was listed on the Information as a witness the prosecution

intended to call; however, defense counsel did not produce Purifoy's letters until the second day of trial—before Purifoy actually testified but after the prosecutor told the jury during his opening statement that Purifoy would be testifying and what the contents of his testimony would be. The prosecutor therefore moved to exclude the letters from evidence, arguing that defense counsel's failure to provide them earlier was a violation of "the discovery order" and that introduction of the letters was unfairly prejudicial. As the prosecutor argued to the court, if he had received the letters before the trial, he may have decided to not call Purifoy as a witness.

Although the prosecutor's motion was not resolved on the record, the letters eventually were utilized with the following statement read to the jury following Purifoy's testimony:

> Ladies and Gentlemen of the Jury, the letters that you have heard were written by Eric Purifoy and have been in custody of the — have been in the custody of the Defendant way back to May of two thousand and one (2001).
>
> The Defendant was required to turn the letters over to the Prosecution in July of two thousand and one (2001), but failed to do so.
>
> The letters were not turned over to the Prosecution until after the trial began. The Court finds this was an intentional violation on the part of the Defendant.

The trial court did not inform the jurors that the parties had stipulated to the statement, but simply

read the statement after Purifoy left the stand. The prosecutor reminded the jurors of Petitioner's discovery violation during his closing argument.

Petitioner argues that his counsel did not have to agree to the above statement; but even so, that he should not have agreed to the statement as written. Petitioner further argues that, "[b]y entering into this stipulation, defense counsel [showed] to the jury that he did not believe in his client's innocence." As the Michigan Court of Appeals correctly concluded, however, defense counsel's decision to use the Purifoy letters—and therefore willingness to agree to the stipulation in order to avoid their exclusion[4]—should not be second-guessed. The letters clearly were harmful to the prosecution's case as they undermined Purifoy's credibility. Additionally, in light of the language of the statement and the fact that the trial court did not tell the jury that the prosecutor and the defendant had stipulated to the statement, the Court does not believe that it informed or suggested to the jurors that defense counsel agreed to its language. Therefore this Court finds no reason why the stipulation would suggest to them that defense counsel did not believe in his client's innocence.

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[4] Petitioner argues that the Michigan Court Rules did not require him to produce the letters because Rule 6.20 1 only mandates discovery of "written or recorded statement by a lay witness whom the party intends to call at trial" and Petitioner never intended to call Purifoy. Rule 6.201, however, further mandates discovery of "any document . . . or other paper that the party intends to introduce at trial." MCR 6.201(A)(5). Purifoy was listed as a prosecution witness and defense counsel intended to use the letters to impeach him during cross-examination.

The second stipulation concerns the proof of Petitioner's prior felony conviction to support the felon in possession charge. The trial court read the stipulation to the jury as follows:

> This is a stipulation between the Plaintiff; the People, and the Defense:
>
> "On January 10, 2000 the defendant was convicted of a felony and less than five years had passed since all imprisonment and/or all the terms of probation have been served."

It is not clear from the record whether the trial court inaccurately read the stipulation or whether the stipulation itself was incorrectly written. Nevertheless, Petitioner does not dispute that he had a prior felony conviction as he indicates that the stipulation should have read: "On January 1998" or "As of January 10, 2000, the defendant had been convicted of a felony." *See* Br. in Support of Petition at 33. Petitioner, however, argues that he was prejudiced by the stipulation because "the jury could infer that [he] had been convicted of the prior felony earlier on the day on which he committed the murder" and therefore "allowed them to speculate that [he] was unrepentant and incorrigible." *See Id.*

The Court finds it purely speculative that the jury assumed from tins instruction that Petitioner was convicted of a felony on the date of the shooting, as Petitioner argues. The Court finds it more probable that the jury had no idea what fact the stipulation was meant to convey. In any event, to establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, a habeas petitioner must make more than merely speculative assertions. *Bowen*

v. Foltz, 763 F.2d 191, 194 (6th Cir. 1985). The Court finds no reason to believe that this poorly worded stipulation prejudiced Petitioner.

Petitioner next contends that counsel was ineffective for failing to request a cautionary instruction that evidence regarding Purifoy's conviction only was relevant as to the issue of Purifoy's credibility, and not as to Petitioner's guilt. While the Court agrees that effective counsel would have requested such an instruction, the Court does not believe that the introduction of evidence regarding Purifoy's convictions rendered Petitioner's trial fundamentally unfair.

Petitioner also claims that his counsel failed to effectively undermine Stephens' credibility. Specifically, Petitioner contends that his counsel should have requested an instruction that a prior conviction for a crime involving theft or dishonesty—in Stephens' case, armed robbery—can be used to decide whether to believe the witness. Petitioner also believes that his attorney should have attacked Stephens' credibility during his closing argument. During his cross-examination of Stephens, however, defense counsel impeached Stephens' credibility on a number of different issues. The fact of Stephens' armed robbery conviction also was elicited during his testimony. Thus the Court cannot find that the outcome of Petitioner's trial would have been different if defense counsel had done more.

Similarly, Petitioner is not able to demonstrate a reasonable probability that the result of the proceeding would have been different if his trial counsel had requested a limiting instruction that his prior felony conviction only could be considered with respect to his felon in possession charge. The specific nature of Petitioner's prior felony was not even raised

during the trial. Additionally, the trial court specifically instructed the jury that it was to weigh the evidence as to each separate charge.

Petitioner next contends that counsel was ineffective for stating, during his cross- examination of Parrish, that counsel did not dispute the obstruction charge brought against Petitioner in Ohio. Petitioner explains that it is unreasonable trial strategy for an attorney to bring out his client's arrests without convictions. This evidence, however, was not brought out by defense counsel initially. During the prosecutor's direct examination of Parrish, Parrish explained that he arrested Petitioner for obstruction when the FBI declined to arrest him as the murder suspect. Defense counsel, during cross- examination, simply responded "not disputed" when Parrish again began explaining why he arrested Petitioner. Under these circumstances, where counsel in fact may have made the statement in order to avoid a further discussion of Petitioner's other bad act, the Court cannot find that counsel's performance was deficient.

Petitioner next contends that counsel was ineffective for not moving to excise portions of Purifoy's letters, which Petitioner claims contained prejudicial and inflammatory references. The Court does not believe that the statements in the letters to which Petitioner refers were unduly inflammatory or prejudicial. Nevertheless, as defense counsel introduced the letters in an attempt to shift the blame to Purifoy – the author of the letters – the Court cannot question his decision to offer their entire contents.

Petitioner claims that counsel was ineffective for failing to investigate Stephens' motive for testifying. According to Petitioner, Stephens expected a plea bargain in a pending Wayne County drug case in exchange for his testimony at Petitioner's trial.

Helgert, however, testified that he never made any promises to Stephens in exchange for his testimony. In fact, approximately six months before Petitioner even was apprehended in Ohio—and therefore before there ever was a prospect of Petitioner's case going to trial—Stephens' drug charges were resolved pursuant to a guilty plea and lie was sentenced to probation under the supervision of the drug court. In any event, defense counsel · thoroughly challenged Stephens' credibility, including eliciting information from which a jury could question Stephens' true motive for informing the police about Petitioner's admission.

Petitioner lastly contends that trial counsel was ineffective in that he failed to challenge, on Sixth Amendment grounds, Petitioner's statement to the police after lie was apprehended in Ohio. According to Petitioner, his Sixth Amendment right to counsel had attached before lie was interviewed by officers in Ohio. Petitioner basis his argument on his belief that a defendant cannot waive his right to an extradition hearing without first receiving the advice of counsel and the fact that he already had agreed to be extradited.

"The Sixth Amendment does not mandate a right to counsel [in interstate extradition] proceedings, since an extradition hearing has a modest function not involving the question of guilt or innocence." *United States v. Doherty,* 126 F.3d 769, 782 (6th Cir. 1997) (internal quotation marks omitted), partially abrogated on other grounds by *Texas v. Cobb* 532 U.S. 162, 121 S. Ct 1335 (2001). Although most states provide a statutory right to counsel at such proceedings, "the invocation of a statutory right to counsel at an extradition hearing does not require the invalidation of a subsequent confession ... even where the defendant is being extradited on the same crime on which lie is ultimately tried, and the confession is in

regards to that crime." *Id.* (citation omitted). Counsel, therefore, was not ineffective in failing to seek the suppression of Petitioner's confession on Sixth Amendment grounds.

For the reasons set forth above, Petitioner fails to show that he was deprived of the effective assistance of trial counsel and is not entitled to habeas relief on his second claim.

Petitioner's Fifth Amendment Claim

Petitioner argues that the state courts erred in concluding that he failed to invoke his right to remain silent and that his limited statements to the police were not the result of coercion. In rejecting this claim, the Michigan Court of Appeals wrote, in part:

> The record discloses that defendant was advised of his Miranda rights and, according to the interrogating officer, verbally acknowledged that he understood those rights. Contrary to defendant's argument, the record does not demonstrate that defendant asserted his right to remain silent. Although defendant refused to sign the advice of rights form, he continued to talk with the officer, albeit sporadically. He answered questions with brief responses, or by nodding his head, but he never said he did not want to talk or that he was not going to say anything. "When a defendant speaks after receiving Miranda warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant or a right to remain silent."

People v. Thompkins, No. 242478, at 2 (Mich. Ct. App. Feb. 2, 2004)(unpublished opinion)(internal footnote omitted)(quoting *People v. McReavy*, 436 Mich. 197, 222, 462 N.W.2d 1(1990)).

In *Miranda v. Arizona*, the Supreme Court held that the interrogation of a suspect must cease when the suspect invokes his right to remain silent or his right to the assistance of counsel. 384 U.S. 436, 474, 86 S. CL 1602, 1627 (1966). If an accused wishes to invoke his right to counsel, however, he must do so unambiguously. *Davis v. United States*, 512 U.S. 452, 458-59, 114 S. Ct. 2350, 2355 (1994). As the Supreme Court held in *Davis*,". . . if a suspect makes reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel our precedents do not require the cessation of questioning." *Id.* at 459, 114 5. Ct. at 2355 (emphasis in original). Although Davis concerned the right to counsel, "[n]onetheless, every circuit that has addressed the issue squarely has concluded that Davis applies to both components of Miranda: the right to counsel and the right to remain silent." *Bui v. DiPaola*, 170 F.3d 232, 239 (1st Cir. 1999) (collecting cases). "A refusal to sign a written waiver form does not conclusively indicate that the suspect wishes to remain silent. *Jones v. Dugger*, 928 F.2d 1020, 1027 (11th Cir. 1991) (citing *North Carolina v. Butler*, 441 U.S. 369,99 S. Ct. 1755 (1979)).

The record does not establish that Petitioner clearly and unequivocally invoked his right to remain silent after Helgert advised him of his Miranda rights. While the officers did most of the talking during their meeting with Petitioner, Helgert testified that Petitioner sometimes nodded his head or verbally responded "yeah," "no," or "I don't know" in response to their dialogue. According to Helgert, Petitioner neither

requested an attorney nor informed the officers that he did not want to speak to them. Petitioner's refusal to sign or initial the written waiver form, to provide a written statement to the police, and to answer some questions did not constitute an unequivocal assertion of his right to remain silent. The Michigan Court of Appeals' rejection of Petitioner's Fifth Amendment claim, therefore, was not an unreasonable application of clearly established law.

Petitioner also claims that his statements to the officers were involuntary, contending that they were coerced after three hours of interrogation and as a result of the officer's appeal to Petitioner's religious beliefs. The trial court found Petitioner's statements voluntary, reasoning:

> Here, there is no claim that the police subjected the defendant to threatened or actual physical abuse, or deprived him of food or medical attention. Additionally, the defendant was not injured or ill when he spoke to the detectives... Further, the police did not detain the defendant excessively, especially given the serious nature of the crimes they were investigating.

People v. Thompkins, No. 01-78216, 5/10/02 op. and Order Denying Def's Mot. to Suppress Statements at 3-4 (Kuhn, J.). The Michigan Court of Appeals held that "[t]he trial court did not clearly err in concluding that Defendant voluntarily waived his right to remain silent." *People v. Thompkins*, No. 242478, at 2 (Mich. Ct. Appeals Feb. 3, 2004). This Court finds that the state courts' decisions were neither contrary to nor an unreasonable application of clearly established law and that the trial court did not base its decision on an unreasonable determination of the facts. Under the

totality of the circumstances, Petitioner's statements were obtained in a manner compatible with the Fifth Amendment. Except for Helgert's statements concerning Petitioner's religious beliefs, Petitioner fails to identify any facts rendering the circumstances of his interrogation coercive. An appeal to a suspect's religious beliefs does not, on its own, render the suspect's confession involuntary. See *Welch v. Butler*, 835 F.2d 92, 95 (5th Cir. 1988); *Barrera v. Young*, 794 F. 2d 1264, 1270 (7th Cir. 1986). As the Seventh Circuit noted in *Barrera*: "It is difficult to describe an appeal to religious beliefs as unacceptable in our society; such appeals are common parts of life and need not cease at the door of the jail." *Berrera*, 794 F.2d at 1270. Therefore, the mere fact that Helgert appealed to Petitioner's religious sensibilities, in the absence of any other coercive tactics, did not render Petitioner's confession involuntary. As the Court concludes that Petitioner did not exercise his right to remain silent when interviewed by Helgert and his partner, the Court finds no merit to Petitioner's claim that the prosecutor improperly elicited evidence showing that Petitioner exercised this right. S*ee supra*.

Petitioner's Challenge to France's In-Court and Out-of-Court Identifications

Lastly, Petitioner claims that the trial court erred in failing to suppress France's in-court identification on the ground that it was the product of a suggestive pre-trial identification procedure. Petitioner argues that the still photograph from (lie surveillance video of Lou's Deli that the officers first showed to France the day after the shooting was unduly suggestive. Petitioner further asserts that the police subsequently visited France, showed him photographs of Petitioner; and told him that Petitioner was the shooter.

"The Supreme Court has held that an identification violates a defendant's right to due process where the identification procedure was so unnecessarily suggestive as to run the risk of irreparable mistaken identification." *Howard v. Bouchard*, 405 F.3d 459, 469 (6th Cir. 2005) (citing *Stovall v Denno*, 388 U.S. 293, 301-02, 87 S. Ct. 1967 (1967) and *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972)). "It is the likelihood of misidentification which violates a defendant's right to clue process." *Biggers*, 409 U.S. at 198, 93 5. Ct. 381-82. " is the linchpin in determining the admissibility of identification testimony." *Manson v. Braithwaite*, 432 U.S. 98, 114, 97 5. Ct. 2243, 2253 (1977). Courts must consider five factors in determining whether an identification is so unnecessarily suggestive that it must be suppressed: (1)the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the time and the confrontation. *Biggers*, 409 U.S. at 199, 93 S. Ct. at 382.

Having considered the above factors, this Court finds the state court's decision that France's identification of Petitioner was not unduly suggestive to be neither contrary to nor an unreasonable application of clearly established law. France initially observed Petitioner as Petitioner walked directly in front of the vehicle in which France was sifting. As Petitioner walked by France's car, he was staring at France and Morris and therefore likely drew their attention. France and Morris actually got out of their car and continued to watch Petitioner as Petitioner walked towards his van. As France testified at Petitioner's preliminary examination hearing, he never took his eyes from Petitioner. Moreover, France

had the opportunity to observe Petitioner when the van pulled alongside Morris' car. The two vehicles were approximately four feet apart and Petitioner's window was open. The officers showed France a still photograph from the surveillance tape the day following the shooting. They did not tell France that anyone in the photograph was a suspect, but merely presented the photograph to France to determine whether the three individuals in the picture were the black males France described walking out of Lou's deli. France immediately identified Petitioner as the shooter and Purifoy as the driver of the van.

As France's initial identification of Petitioner was not unduly suggestive, it is not relevant whether the police pointed out Petitioner in other photographs during subsequent meetings. Moreover, France's subsequent in-court identification of Petitioner also was not tainted. Accordingly, the Court concludes that Petitioner is not entitled habeas relief based on this claim.

Conclusion

For the reasons stated above, the Court concludes that the state courts' adjudication of Petitioner's claims was neither contrary to nor an unreasonable application of clearly established law or an unreasonable determination of the facts in the light of evidence presented in the state court proceedings. The Court therefore concludes that Petitioner is not entitled to habeas corpus relief.

Accordingly,

IT IS ORDERED THAT, Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is *DENIED WITH PREJUDICE.*

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
Elizabeth L. Jacobs, Esq.
Brad H. Beaver, Esq.

Order

Entered: July 29, 2004

Michigan Supreme Court
Lansing, Michigan

125667

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE
OF MICHIGAN,
Plaintiff-Appellee,

v

VAN CHESTER THOMPKINS, JR.,
Defendant-Appellant.

SC: 125667
COA: 242478
Oakland CC:
01-178216-FC

/

On order of the Court, the application for leave to appeal the February 3, 2004 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 29, 2004 *s/ Corbin R. Davis*
Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,	UNPUBLISHED February 3, 2004
Plaintiff-Appellee,	No. 242478 Oakland Circuit Court
v	LC No. 2001-178216-FC
VAN CHESTER THOMPKINS, JR.,	
Defendant-Appellant.	

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

The jury convicted defendant of first-degree murder, MCL 750.316, assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and three counts of possession of a firearm during commission of a felony, MCL 750.227b. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent prison terms of natural life without parole for the first- degree murder conviction, twenty-five to forty years for the assault conviction, and four to ten years each for the felon in possession and CCW convictions, to be served consecutive to three concurrent two-year terms for the felony-firearm convictions.

The jury convicted defendant for shooting Samuel Morris to death and for the non-fatal shooting

of Frederick France. Defendant appeals as of right, and we affirm.

I. Defendant's Statements to the Police

Defendant argues that the trial court erred by denying his motion to suppress his statements to the police. Defendant asserts that the police improperly continued to interrogate him after he "implicitly" invoked his right to remain silent by failing to answer the officers' questions. See *People v McReavy*, 436 Mich 197, 218; 462 NW2d 1 (1990). We disagree.

The record discloses that defendant was advised of his *Miranda*[1] rights and, according to the interrogating officer, verbally acknowledged that he understood those rights. Contrary to defendant's argument, the record does not demonstrate that defendant asserted his right to remain silent. Although defendant refused to sign the advice of rights form, he continued to talk with the officer, albeit sporadically. He answered questions with brief responses, or by nodding his head, but never said he did not want to talk or that he was not going to say anything. "When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of a right to remain silent." *McReavy*, *supra* at 222. The trial court did not clearly err in concluding that defendant voluntarily waived his right to remain silent and that he did not subsequently invoke his right to silence. *People v Bender*, 452 Mich 594, 604-605 n 9; 551 NW2d 71(1996); *People v Daoud*, 462 Mich 621, 634;

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[1] *Miranda v. Arizona*, 384 US 436, 477; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

614 NW2d 152 (2000). Defendant's statements were properly admitted into evidence.

II. Prosecutorial Misconduct

Defendant also maintains that the prosecutor's conduct denied him a fair trial. Prosecutorial misconduct issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court must consider the prosecutor's conduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). However, "appellate review of allegedly improper conduct by the prosecutor is precluded if the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *Schutte, supra*.

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect the fairness, integrity or public reputation of judicial proceedings

> independent of the defendant's innocence." [*People v. Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citations omitted).]

To the extent it was improper for the prosecutor to introduce evidence of codefendant Purifoy's criminal conviction, see *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982), defendant's substantial rights were not affected because the defense asserted that Purifoy was the shooter and that the evidence of Purifoy's conviction linked Purifoy to the gun. Further, the evidence did not show that codefendant Woodward was convicted in this matter. Therefore, this unpreserved issue did not prejudice defendant and, thus, does not warrant reversal.

Moreover, the prosecutor's rebuttal arguments were responsive to the defense arguments and did not shift the burden of proof to defendant. *People v. Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v. Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Also, it was not improper for the prosecutor to comment on defendant's refusal to write out a statement during his police interrogation. A prosecutor properly may comment on a defendant's behavior and demeanor during a custodial interrogation. *McReavy, supra* at 221. Similarly, it was not plain error for the prosecutor to question Purifoy regarding the contents of the letters that defendant sent to him in prison, or to draw inferences from the absence of certain statements in those letters. *Fields, supra* at 115.

Further, for the most part, the prosecutor's comments directed at defense counsel did not amount to an improper personal attack designed to shift the jury's focus to counsel's personality. See *People v. Phillips*, 217 Mich. App 489, 497-498; 552 NW2d 487

(1996). To the extent it was improper for the prosecutor to suggest that defense counsel would have presented a different story if the surveillance tape did not exist, the remark did not deny defendant a fair trial and a cautionary instruction, had one been requested, could have cured any resulting prejudice. Therefore, this issue does not require reversal. *Schutte, supra.*[2]

Additionally, we are not persuaded that reversal is required because of the prosecutor's questioning of Tomika Stephens or Detective Helgert. Where Stevens testified that she was defendant's girlfriend for six years, the prosecutor was permitted to examine her concerning the extent of her relationship and familiarity with defendant. To the extent the prosecutor's questioning of these witnesses suggested defendant's possible involvement in other criminal activities, we conclude that his substantial rights were not affected where the questioning did not directly refer to other specific crimes. Further, it was undisputed that defendant possessed several pieces of false identification when he was eventually arrested and the testimony suggesting defendant's possible involvement in other activities provided an alternative explanation for the false identifications apart from suggesting that they were attributable to defendant's involvement in the charged offense here. Accordingly, this unpreserved issue does not warrant reversal.

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[2] Defendant also waived any error involving Purifoy's letters when he argued for their admission, *People v. Riley*, 465 Mich 442, 448; 636 NW2d 514 (2001); *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995), and the prosecutor's argument that the various witnesses consistently identified defendant as the shooter was supported by the evidence and, therefore, was not improper.

Though we agree that the prosecutor made an improper appeal to sympathy in his opening statement, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411(2001), the remark was brief and isolated, and the court's instruction to the jury that it could not let sympathy influence its decision was sufficient to cure any prejudice. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, this unpreserved issue does not warrant reversal.

III. Effective Assistance of Counsel

Defendant says that lie was denied the effective assistance of counsel and that the trial court erred in denying his motion for an evidentiary hearing on this issue. To establish a claim of ineffective assistance of counsel, the burden is on the defendant to show that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. *People v. Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999); *People v Rice* (On Remand), 235 Mich App 429, 445; 597 NW2d 843 (1999).

"If the record made before a defendant is convicted does not factually support claims he wishes to urge on appeal, lie should move in the trial court for a new trial ... and seek to make a separate record factually supporting the claims." *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Here, we agree that further development of the record is not required in order to resolve defendant's claims and, therefore,

remand for an evidentiary hearing is not necessary. See also MCR 7.21 l(C)(l)(a)(ii).

Defendant argues that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct. For the most part, we found that the prosecutor's conduct was not improper and, to the extent some of the prosecutor's conduct could be viewed as improper, it did not affect the outcome. Therefore, defendant was not prejudiced by counsel's failure to object to these matters.

Also, defense counsel's decisions to stipulate to certain items were matters of trial strategy and defendant has not overcome the presumption of sound strategy. *Avant, supra*; *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). We will not second-guess counsel's decisions.

We also agree with the trial court that defendant was not prejudiced by defense counsel's failure to request certain jury instructions. Although the court did not specifically instruct the jury that it could consider Purifoy's conviction only for purposes of his credibility, the record does not disclose an attempt to argue that conviction for an improper purpose. Further, defendant was not prejudiced by counsel's failure to ask for an instruction that Omar Stephen's prior conviction for a theft crime could be used for purposes of determining his credibility, considering that there was substantial evidence presented questioning his reliability and credibility as a witness. Nor was defendant prejudiced by counsel's failure to request a limiting instruction that defendant's prior felony conviction could be considered only for purposes of the felon in possession charge. The record does not reveal an attempt to argue that conviction for an improper purpose.

Defense counsel's stipulation that defendant had a prior, undisclosed felony conviction for purposes of the felon in possession charge and the trial court's instructions concerning that offense were sufficient to safeguard defendant's rights. Counsel was not ineffective for failing to request additional instructions. *Green, supra.*[3]

For the foregoing reasons, defendant has failed to establish that lie was denied the effective assistance of counsel.

IV. Identification Testimony

Defendant asserts that the trial court erred in denying his motion to suppress his identification by the surviving victim. "In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v. Kuryczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

Contrary to defendant's argument, the record does not disclose that a photographic showup was conducted at the hospital on the morning after the shooting. Rather, the record indicates that the victim identified defendant from a series of surveillance photos that were taken at the location where the events surrounding the offense began. Although a

---

[3] Defense counsel's decision to use the Purifoy letters was a matter of trial strategy, which we will not second-guess, *Avant, supra*; also, we agree with the trial court that defense counsel sufficiently attacked Omar Stephen's credibility. Defendant has not shown that counsel's efforts in this regard were deficient. And, defendant has not shown that he was improperly interviewed in violation of his right to counsel.

photographic showup was subsequently conducted, the victim did not identify defendant at that showup.[4] There was also evidence that the victim participated in a second photographic showup, but it did not include defendant's picture and the victim failed to identify anyone. Because defendant was not identified in either of these two later photographic showups, there was no identification evidence to suppress, nor any basis for suppressing the victim's in-court identification.[5]

The trial court did not error in denying defendant's motion to suppress the victim's identification testimony.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly

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[4] The victim explained later that he did not identify defendant at this time because the photo of defendant was an older one, taken when defendant was a juvenile, with a different hairstyle.

[5] Because defendant was not in custody, we find no merit to defendant's claim that the photographic showups were improperly conducted in the absence of counsel. *Kuryczyk, supra* at 302.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VAN CHESTER THOMPKINS, JR,

Petitioner,

-vs-

MARY BERGHUIS, WARDEN, BROOKS CORRECTIONAL FACILITY,

Respondents.
_____/

05-70188
PATRICK J. DUGGAN
MAGISTRATE JUDGE SCHEER

PETITION FOR WRIT OF HABEAS CORPUS
UNDER 28 USC § 2254

NOW COMES Petitioner Van Chester Thompkins, Jr. by and through his attorney, Elizabeth L. Jacobs, and in support of his petition for writ of habeas corpus states as follows:

1. Petitioner is incarcerated at Brooks Correctional Facility, 2500 S. Sheridan R Muskegon, Mich, 49444;

2. His inmate number is #339216;

3. On May 20, 2002, Petitioner was convicted by a jury of premeditated first degree murder in violation of MCL. 750.3 possession of a firearm during the commission of a felony in violation of MCL 750.227b; assault with intent to murder contrary to MCL 750.83; possession of a firearm during the commission of a felony in violation of MCL 750.227b; felon in possession of a firearm contrary to 750.224f; possession of a firearm during the commission of the

felony "Felon in possession" in violation of MCL 750.227b; and carrying a concealed weapon in a motor vehicle contrary to MCL 750.227 in Oakland County Circuit Court, State of Michigan.

4. On June 4, 2002, Petitioner was sentenced to 11th in prison without parole on count I; a mandatory sentence of two years on count II; 25-40 years on count III; a mandatory sentence of two years on count IV; 4-10 years on count V; a mandatory sentence of two years on count VI; and 4-10 years on count VII by Judge Richard Kuhn, (Appendix; 74a).

5. Petitioner did not testify at trial.

6. Petitioner timely claimed appeal and fled a motion for new trial under MCR7.208(13) in which a request was made for an evidentiary hearing on the issue of ineffective assistance of counsel.

7. On July 31, 2003, that motion was denied, (LCT Opinion and Order; 62a).

8. Petitioner filed a motion for a remand in the Michigan Court of Appeals so that an evidentiary hearing could be held on the issue of ineffective assistance of counsel.

9. On September 12, 2003, that motion was denied, (Order; 76a).

10. A second motion to remand based on Omar Stephens' recanting affidavit was denied on January 13, 2004. (Order; 83a).

11. On January 13, 2004, that motion was denied. (Order; 76a)

12. The following issues were raised in the appeal of right:

I. WHERE APPELLANT REMAINED MUTE FOR THREE FOURS AFTER BEING INFORMED OF HIS MIRANDA RIGHTS AND WHERE HE REFUSED TO SIGN THE RIGHTS FORM, HE WAS UNEQUIVOCALLY EXERCISING P FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION. THE ANSWERS GIVEN WERE ELICITED IN VIOLATION OF THE DUE PROCESS CLAUSE AND ALSO IN VIOLATION OF THE DECISION IN MIRANDA V ARIZONA THE TRIAL JUDGE CLEARLY ERRED IN ADMITTING THE ANSWERS MADE AT THE END OF THAT PERIOD OF TIME.

II. PROSECUTORIAL MISCONDUCT DENIED DUE PROCESS OF LAW IN THE FOLLOWING WAYS:

a. The prosecutor offered evidence of the co-defendant's jury verdict and guilty plea conviction, offered evidence of the uncharged acquaintance's unrelated bad acts and offered opinion evidence.

b. The prosecution shifted the burden of proof to the defense in the rebuttal argument and also denigrated defense counsel.

c. The prosecution elicited evidence of defendant's exercise of his right to remain silent and of his right to counsel and he denigrated counsel.

d. The prosecution circumvented the hearsay rule by pretending to use the Purifoy letters for impeachment.

e. The prosecution argued facts not in evidence.

f. The prosecutor's questioning of Tomika Stephens and of Detective Helgert concerning the appellant's one-year absence horn the jurisdiction was improper where its effect both explicitly and implicitly was to offer evidence that defendant had committed crimes other than the ones for which he was on trial.

g. The prosecutor asked the jury to sympathize with the mother of the deceased.

III. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO OBJECT TO PROSECUTORIAL MISCONDUCT WHICH INCLUDED A TRIAL-LONG EFFORT TO CONVICT APPELLANT BASED ON GUILT BY ASSOCIATION. THE TRIAL COURT CLEARLY ERRED WHEN IT DENIED APPELLANT'S REQUEST FOR A GINTHER HEARING.

a. Defense counsel failed to object to prosecutorial misconduct.

b. Counsel stipulated to two matters that unfairly prejudicial appellant.

c. Counsel failed to request a limiting instruction both immediately after the accomplice testimony and also an instruction to be given during the charge to the jury failed to ask for an instruction on the use of evidence of

prior convictions, failed to ask for a limiting instruction concerning defendant's conviction for a prior felony.

d. Counsel admitted his client's guilt of obstruction of an officer.

e. Counsel failed to move to excise portions of the Purifoy letters that were inflammatory and prejudicial.

f. Counsel failed to investigate Omar Stephens' motive for testifying.

g. Counsel failed to raise the issue, in challenging the statement that the appellant was interviewed without prior notice the attorney then representing appellant in the extradition proceeding.

IV. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS FREDERICK FRANCE'S IN-COURT AND OUT-OF-COURT IDENTIFICATION OF THE APPELLANT AS THE SHOOTER.

13. On February 3, 2004, in an unpublished opinion in case #242478, the Court of Appeals affirmed his convictions. (COA Opinion; 84a).

14. On February 25, 2004, petitioner applied or leave to appeal in the Michigan Supreme Court raising the same issues he raised in the Court of Appeals;

15. On July 29, 2004, the Michigan Supreme Court in case #125667 denied leave to appeal stating that it was not persuaded that the questions presented should be reviewed by the Court. (MSC Order; 89a).

16. Petitioner is being held unlawfully for the following reasons:

I. PROSECUTORIAL MISCONDUCT DENIED PETITIONER DUE PROCESS OF LAW IN THE FOLLOWING WAYS:

a The prosecutor offered evidence of the co-defendant's jury verdict and guilty plea conviction, offered evidence of an uncharged acquaintance's unrelated bad acts, and offered opinion evidence on the guilt of the Petitioner.

b. The prosecution elicited evidence of defendant's exercise of his right to remain silent and of his right to counsel and he denigrated counsel.

c. The prosecutor's questioning of Tomika Stephens and of Detective Helgert concerning the appellant's one-year absence from the jurisdiction was improper where its effect both explicitly and implicitly was to offer evidence that defendant had committed crimes other than the ones for which he was on trial.

d. The prosecution offered unfairly prejudicial information by circumvented the rules of evidence in pretending to use the Purifoy letters for impeachment.

e. The prosecution argued facts not in evidence.

f. The prosecutor asked the jury to sympathize with the mother of the deceased.

g. The prosecution shifted the burden of proof to the defense in the rebuttal argument.

II. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO OBJECT TO PROSECUTORIAL MISCONDUCT WHICH INCLUDED A TRIAL-LONG EFFORT TO CONVICT PETITIONER BASED ON GUILT BY ASSOCIATION THE TRIAL COURT CLEARLY ERRED WHEN IT DENIED APPELLANTS REQUEST FOR AN EVIDENTIARY HEARING ON THIS ISSUE.

a. Defense counsel failed to object to prosecutorial misconduct.

b. Counsel stipulated to two matters that unfairly prejudicial appellant.

c. Counsel failed to request a limiting instruction both immediately after the accomplice testimony and also an instruction to be given during the charge to the jury, failed to ask for an instruction on the use of evidence of prior convictions, failed to ask for a limiting instruction concerning defendant's conviction for a prior felony.

d. Counsel admitted his client's guilt of obstruction of an officer.

e. Counsel failed to move to excise portions of the Purifoy letters that were inflammatory and prejudicial.

f. Counsel failed to investigate Omar Stephens' motive for testifying.

g. Counsel failed to raise the issue in challenging the statement that the appellant was interviewed without prior notice to the

attorney then representing appellant in the extradition proceeding.

III. WHERE PETITIONER REMAINED MUTE FOR THREE HOURS AFTER BEING INFORMED OF HIS MIRANDA RIGHTS AND WHERE HE REFUSED TO SIGN THE RIGHTS FORM, HE WAS UNEQUIVOCALLY EXERCISING HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION. THE ANSWERS GIVEN AT THE VERY END OF THAT TIME PERIOD WERE ELICITED IN VIOLATION OF THE DUE PROCESS CLAUSE AND ALSO IN VIOLATION OF THE DECISION IN MIRANDA V ARIZONA.

IV. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS FREDERICK FRANCE'S IN-COURT AND OUT-OF-COURT IDENTIFICATION OF THE PETITIONER AS THE SHOOTER.

17. The decision of the Michigan appellate courts is based on an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, 28 USC 2254 (d)(1).

19. The decision of the Michigan appellate courts is contrary to clearly established federal law as determined by the Supreme Court of the United States. 28 USC 2254 (d)(1).

20. The decision of the Michigan appellate courts was based on an unreasonable determination of the facts in light of the evidence presented, 28 USC 2254 (d)(2).

21. Petitioner is actually innocent of these charges.

22. The lawyer who represented Petitioner at trial was

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18580 Mack Ave.
Grosse Pointe Farms, Mi 48236
(313) 885-6800

23. The lawyer who represented Petitioner on the motion for new trial, on his direct appeal, and on his application for leave to appeal in the Michigan Supreme court was Elizabeth L. Jacobs. See address below.

WHEREFORE, Petitioner asks this Court to grant this petition and let the writ issue.

Respectfully submitted,

s/ *Elizabeth L. Jacobs*
ELIZABETH L. JACOBS
(P24245)
Attorney for Petitioner
1125 Ford Bldg.
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(313) 962-4090

Dated: January 14, 2005

OPPOSITION BRIEF

No. 08-1470

In the Supreme Court of the United States

MARY BERGHUIS, Warden,

Petitioner,

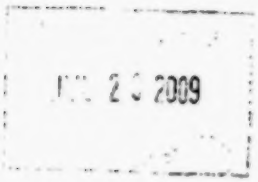
v

VAN CHESTER THOMPKINS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION



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QUESTIONS PRESENTED

I. Should certiorari be granted where the decision of the Sixth Circuit Court of Appeals rests on clearly established Supreme Court law applied appropriately to the facts of the case?

II. Should certiorari be granted where the Sixth Circuit Court of Appeals properly applied the 28 USC 2254(d) deference standard and where it also gave adequate deference to the state court's finding that Mr. Thompkins was denied the effective assistance of counsel?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The Petitioner is Mary Berghuis, Warden of a Michigan correctional facility. The Respondent is Van Chester Thompkins Jr., an inmate.

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The opinion of the Court of Appeals is published at 547 F3d 572 (6th Cir, 2008). Apx 1a-17a. The Opinion and Order of the United States District Court denying the petition is unpublished. Apx 19a-51a. The decision of the Michigan Court of Appeals affirming Thompkins' conviction is unpublished. Apx 53a-57a.

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction. Jurisdiction is based on 28 USC 1254(1). See also 28 USC 2101(C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Two constitutional Amendments are involved. One is the Fifth Amendment which states in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself...

The other is the Sixth Amendment which states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

The statute involved is 28 USC 2254(d) which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgement of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim
>
> > (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or.
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

INTRODUCTION

The petition for certiorari filed in this case should be denied because it does not meet the "compelling reasons" standard found in Supreme Court Rule (SCR) 10. That rule offers a non-exclusive list of reasons that would earn the adjective "compelling". In this case, the Petitioner contends that the compelling reasons are that the United States Court of Appeals expanded the decision in *Miranda v Arizona* and the Court did not accord deference due under 28 USC 2254(d). It cites to SCR 10(a) and ©.

On the first issue, Petitioner misapprehends a key point in the decision in *Miranda v Arizona*, 384 US 436 (1966) that the right to remain silent may be asserted in any manner and, Petitioner ignores the holding in *Michigan v Moseley*, 423 US 96 (1975) which holds that persistent questioning is coercive. It also basis its conflict-among-the-Circuits argument on cases which are not factually similar. The Sixth Circuit was not guilty of attempting to expand a United States Supreme Court decision on habeas review.

On the second ground, the Petitioner fails again to show a compelling reason The review of the ineffective assistance of counsel claim did not exceed the limits codified at 28 USC 2254(d). Petitioner describes the evidence as strong and thus argues that the State courts acted reasonably in rejecting the claim. However, the evidence was not strong. And the State court acted unreasonably in analyzing applied the second prong of the *Strickland v Washington*, 466 US 668 (1984), where it held that prejudice was not shown because the prosecutor did not exploit counsel's failure to obtain a limiting instruction. The Sixth Circuit Court of Appeals noted that a prosecutor's intent is not relevant on this issue. It found that the error allowed evidence to come in that was outcome determinative. Therefore the Court of Appeals properly applied the standard found at 28 USC 2254(d). On this ground, too, the petition should be denied.

Respondent succeeded on two grounds in the Court of Appeals. Petitioner must succeed on both grounds in order to avoid the issuance of the writ of habeas corpus. On either ground, it has not shown compelling reasons for the grant of the petition.

COUNTER STATEMENT OF FACTS

Van Chester Thompkins, Jr. was charged in the information with premeditated first degree murder in violation of MCL. 750.316; possession of a firearm during the commission of a felony in violation of MCL 750.227b; assault with intent to murder contrary to MCL 750.83; possession of a firearm during the commission of a felony in violation of MCL 750.227b; felon in possession of a firearm contrary to 750.224f; possession of a firearm during the commission of the felony "Felon in possession" in violation of MCL 750.227b; and carrying a concealed weapon in a motor vehicle contrary to MCL 750.227.

On January 10, 2000, a shooting occurred in a strip mall parking lot on Greenfield Road in the city of Southfield. Samuel Morris died from multiple gunshot wounds. His friend, Frederick France, although shot several times, survived.

Three men were identified as being wanted for questioning. These three were the Respondent, Eric Purifoy, and Myzell Woodward. Myzell Woodward contacted the police shortly after the incident, gave a statement, and was never charged. Eric Purifoy, after a phone call from the police, turned himself in. He was charged with the same crimes described above and was tried in August of 2000. He was acquitted of the murder and assault charges but convicted of carrying a concealed weapon. He also pled guilty to the other gun charges.

More than a year after the incident, on February 19, 2001, the defendant was found near Columbus, Ohio and was arrested. Two detectives from the Southfield, Michigan Police Department drove to Columbus, Ohio to interrogate the defendant for three hours, finally obtaining an admission of guilt.

Prior to trial, a hearing contesting the voluntariness of defendant's statement was held. Detective Helgert testified that he advised the defendant of his rights and he understood them. However, Thompkins refused to sign anything including the rights form. The detective admitted that the defendant never indicated that he was willing to waive his rights (Apx 3a).

The interrogation lasted approximately three hours. Only after the detective asked the

defendant if he believed in God, 2 hours and 45 minutes into the session did the defendant answer any questions. The detective described the interview as very one-sided. Mr. Thompkins shared very limited verbal responses with the detectives. He was uncommunicative. The only thing relative to his involvement occurred very near the end of interview when the detective decided to take a different tact, spiritual tact, when he asked the defendant if he believed in god. He then made eye contact with the detective me for one of the few times that he did for the interview. According to the detective his eyes welled up with tears. He answered orally and said "Yes.": I asked if he had prayed to God? And he said "Yes." And I asked him if he had asked god to forgive him for...shooting that boy down. And he answered "Yes." (Apx 3a).

The detective also testified refused to write anything and wouldn't touch the pad or paper that was placed in front of him. And that after that one statement e had nothing more of any consequence to say and the interview was terminated shortly thereafter. (Apx 3a).The detective described the conversation as very nearly a monologue and that the defendant largely remained silent. (Apx 3a). The trial court issued a written opinion denying the motion to suppress the statements. (Apx 58a).

At trial, the defense theory was that Eric Purifoy was the shooter and that defendant was merely present. During testimony, the surviving complainant identified the defendant as the shooter and Eric Purifoy as the driver. Pursuant to prosecution questions, he also testified that Purifoy was charged with the murder but found not guilty. (Apx 3a).

During the direct examination at trial of Detective Helgert, he was asked what Eric Purifoy had been charged with. He listed the same seven counts that appellant was charged with and also told the jury that Purifoy was charged as an aider and abettor. He also stated that Purifoy had been found not guilty. (Apx 4a).

The prosecution offered evidence that when the Detective Helgert asked the defendant if he believed in God and if he prayed to God for forgiveness for shooting that boy down, the defendant answered "Yes." (Apx 4a-5a). But he also testified that beside that he only remembered the defendant saying two things in the interrogation. Early on, he had refused the offer of a peppermint

and he had stated that the chair was hard. (Apx 5a).

Eric Purifoy testified that he was the driver of the van and Thompkins was in the passenger seat. Although he did not see the defendant shoot anyone, after the shooting, he saw a gun in the defendant's hand. (Apx 4a).

The jury returned verdicts of guilty as charged. Defendant was sentenced to life in prison without parole on count I. On counts II, IV and VI, he received mandatory sentences of two years. On count III, he was sentence to 25-40 years. On count V, he was sentenced to 4-10 years. On count VII, he was sentenced to 4-10 years.

On December 30, 2002, a motion for new trial and request for a hearing on ineffective assistance of counsel were filed in the trial court. On July 31, 2003, the trial court denied the motion and the request.

On February 3, 2004, the Michigan Court of Appeals in a per curiam opinion affirmed appellant's convictions. (Apx 53a). On July 29, 2004, the Michigan Supreme Court. denied leave to appeal stating that it was not persuaded that the questions presented should be reviewed by the Court. (Apx 52a).

On January 19, 2005, Defendant filed a petition for a writ of habeas corpus in the United States District Court for Eastern District of Michigan. On September 28, 2006, a district court judge denied the petition. (Apx; 19a). On November 19, 2008, the United States Court of Appeals for the Sixth Circuit reversed the decision of the district court. (Apx 1a). On February 24, 2009, the Court denied a motion for rehearing en banc. (Apx 18a)

Other facts will be referred to in the body of the arguments and are incorporated into this Statement by reference

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED WHERE THE SIXTH CIRCUIT'S DECISION RESTS ON CLEARLY ESTABLISHED SUPREME COURT LAW APPLIED APPROPRIATELY TO THE FACTS OF THE CASE.

The Supreme Court in *Miranda v Arizona*, 384 US 436, 449-450 (1966), found that coercion is inherent in custodial interrogations and that it can be mental as well as physical. Because custodial interrogation by its very nature isolates and pressures the individual even without employing brutality, the third degree, or other specific stratagems, custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. *Miranda, Id* at 455; *Dickerson v United States*, 530 US 428, 435 (2000). The *Miranda* Court held that unless a defendant was advised of certain rights, such as the right to remain silent and the right to the presence of an attorney, the prosecution could not offer at trial any statements the police extract from him. The Court made it very clear that if a suspect in any manner at any time during questioning indicates that he wishes to remain silent, the police must respect the exercise of that right.

> If the individual indicates **in any manner**, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion subtle or otherwise. Without the right to cut-off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. (Emphasis added).

Miranda, 384 US at 473-474.

The assertion of the privilege must be "scrupulously honored" and the continuation of questioning after an accused has indicated that he wants to exercise his right to remain silent operates on the individual to overcome his free choice in giving a statement. It circumvents the warnings themselves. Subsequent persistent questioning will be viewed as an effort to wear down the suspect's resistance to force him to change his mind. *Michigan v Moseley*, 423 US 96, 104, 105-106 (1975). Any statement taken pursuant to this method which forces a defendant to change his mind is not the product of free will.

Once a defendant has indicated a desire to remain silent, interrogation may only continue if 1) a significant interval has elapsed, and 2) fresh warnings are given. Where there has been no lapse of time or only a short lapse, the court may infer that the officers were persisting in repeated efforts to wear down the suspect's resistance. *Moseley, Id* at 105-106.

The due process test for evaluating voluntariness is whether the defendant's will was overborne by the circumstances surrounding the giving of the confession. It takes into consideration the totality of all the surrounding circumstances, including the characteristics of the accused and the details of the interrogation. The Court must weigh the circumstances of pressure against the power of resistance of the accused. *Dickerson v United States*, 530 US 248 (2000).

The prosecution has the burden of establishing a knowing and intelligent waiver of the rights. *Colorado v Connelly*, 479 US 157, 168 (1986). That burden is a heavy one where the waiver of a fundamental constitutional right is at issue. To prove a waiver, the State must show "an intentional relinquishment or abandonment" of the right and a defendant will be afforded every reasonable presumption against waiver. *Johnson v Zerbst*, 304 US 458, 464 (1938).

A. Where a suspect has refused to answer any questions for almost three hours despite repeated questioning, he has exercised his right to remain silent.

A suspect may indicate his desire to remain silent after being advised of his *Miranda* rights "in any manner" and that decision must be "scrupulously honored." The government's burden to prove a waiver of the rights is a heavy one.

In the instant case, the defendant did not equivocate about whether to assert his right to remain silent. He answered no questions.

On February 22, 2001, Detective Helgert of the Southfield Police Department in Michigan and his partner interrogated Respondent at a jail in Ohio. The interrogation lasted 3 hours. At the start of the session, Helgert advised the defendant of his rights and believed that he understood them. However, the Defendant refused to sign anything including the rights form and he never indicated that he was willing to waive his rights. He described the interrogation as very one-sided, the defendant sharing very limited verbal responses with the detectives and remaining silent. (Apx 11a).

He spent a lot of time sitting simply holding his head down. (Apx 12a). The detective further stated that the interrogation was very nearly a monologue with defendant largely "remaining silent." (Apx 3a).

The Detective testified that the only thing defendant said relative to his involvement was very near the end of the interrogation "and again it was so one-sided, he was uncommunicative", I finally looked at him, and I asked him, tried to take a different tact, I guess what I call a spiritual tact, whether or not he believed in god. He made eye contact with me for one of the few times that he did for the interview. I saw his eyes well up with tears. He answered me orally and said "Yes.": I asked if he had prayed to God? And he said "Yes." And I asked him if he had asked god to forgive him for...shooting that boy down. And he answered "Yes." This occurred after 2 hours and 45 minutes of the officer repeatedly asking questions. (Apx 3a).

Although the officer said the defendant nodded his head, the detective could not state what it was that the defendant nodded his head to. He only remembered that the defendant declined the offer of a peppermint and commented that the seat was hard. (Apx 5a).

After the suppression hearing, the Court issued a written opinion denying the motion to suppress the statements. (Apx 58a). The trial court used the wrong test for deciding whether there had been a voluntary waiver. The test it applied was whether the waiver was voluntary in terms of the police conduct and whether it was made knowingly and intelligently. The court relied on the decision in *People v Abraham*, 234 Mich App 640 (1999). The Abraham court believed that *Miranda* warnings were not constitutionally based relying on the Fourth Circuit's decision in *Dickerson v United States*, 166 F3d 667 (4th Cir, 1999) which by the time of the decision on the motion to suppress had been reversed. In that case, the United States Supreme Court held that the Miranda rights were constitutionally based. *Dickerson v United States, supra*.

The trial court in this case stated denied the motion to suppress the statement because the defendant never invoked his right to remain silent and participated in the interview by making eye contact, nodding, and answering questions with "I don't know." (Apx 3a). But *Miranda*

acknowledged that coercion can be mental as well as physical. Continuing to interrogate Mr. Thompkins for almost three hours, after he had indicated that he was exercising his right to remain silent and taking a spiritual tact, operated on him to overcome his free choice in giving a statement. As *Moseley* noted respect for the defendant's exercise of his rights counteracts the coercive pressure of the custodial setting. *Moseley, supra*, at p. 104. Here no such respect was accorded to defendant's decision. By repeatedly[1] questioning the defendant and by trying several different tactics which were detailed at trial, the police circumvented *Miranda*. (Helgert Trial Transcript III 103-111; Apx 62a-70a). The two detectives wore Petitioner down and extracted admissions which were not the product of a free, voluntary will.

The trial court also held that appellant was not detained excessively especially given the serious nature of the crime. (Apx 61a). The serious nature of the crime is not a factor to consider in deciding the voluntariness of a statement. One's rights are not dependent on the kind of crime of which one is accused. Rights do not fluctuate They exist, or they do not exist. If they did fluctuate, then certainly where the crime was more serious, the rights would be more respected. The court's logic on this point is backwards. Further, three hours is not a brief encounter. It is a time period within which a defendant's free will may be overborne by the inherently coercive custodial setting.

The Michigan Court of Appeals affirmed the trial court holding that defendant did not explicitly assert his right to remain silent and therefore voluntarily waived it. (Apx 53a-54a). It also stated that the defendant answered questions, but this finding was not supported by the record since the defendant answered no questions about his involvement in the crime until two hours and 45 minutes had elapsed.

The state court applied the wrong test in making its decision. It did not consider the totality of the circumstances and it erred in holding that the statement was made voluntarily and in holding that the petitioner failed to assert his right to remain silent. Here the petitioner's prolonged silence was an indication, and not an ambiguous one, that he was exercising his right to remain silent, a right

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1 "We had been very repetitive." (Helgert III 109; Apx 68a).

of which he had just been informed. *Doyle v Ohio*, 426 US 610, 617 (1976).

Petitioner also contends that there is a conflict in the Circuits. However the cases cited by petitioner are inapposite to the one at bar. In *Bui v DiPaola*, 170 F3d 232, 239 (1st Cir, 1999), the First Circuit found an implied waiver where after the defendant acknowledged he understood them and he immediately began talking. In fact beside his spontaneous statements, Mr. Bui also questioned the police about their informant. The Fifth Circuit also found an implied waiver on similar facts. *United States v Ogden*, 572 F2d 501, 502 (5th Cir, 1978).

Nor is there a conflict with the Seventh Circuit. In *Gorham v Franzen*, 760 F2d 786 (7th Cir, 1985), the Court found that although the defendant did not explicitly waive his rights nor explicitly invoke his right to remain silent his ensuing conduct supported a finding of a waiver. That conduct included the fact that several officers gave the defendant his rights; defendant was clearly familiar with his rights and familiar with the criminal justice system; defendant also stated that he knew people in prison who had given statements and he wasn't sure that he wanted to go that route; he asked questions of the officer in order to find out what kind of evidence the officers had; and after being confronted with some evidence he began to make admissions. Eventually a 42-page statement was taken from the defendant after a court reporter was brought in. It appears that the rights were first read to the defendant at 9:30pm and by a few minutes after 10:00pm he was talking.

Thus in *Gorham* you have another example of a suspect who actively engages the officers in conversation and confesses shortly after being advised of his rights. Upon these facts, one can conclude that the right to remain silent was being voluntarily and knowingly waived. But these facts are not the facts in the case at bar.

Petitioner also incorrectly analogizes this case to *Fare v Michael*, 442 US 707, 727 (1979) where the court found that the refusal to answer some questions, while answering others does not amount to a request to terminate the interview. In the case at bar, no questions were answered. Likewise when Petitioner cites to *Connecticut v Barrett*, 479 US 523 (1987) he is mistaken in thinking it similar to the case at bar. *Barrett* is a right to counsel case to which a less stringent

standard is applied. There the Court found that the defendant invoked his right to counsel only as to written statements but because he willingly made an oral statement there was a waiver for that statement

Nor did the Court of Appeals ignore the decision in *North Carolina v Butler*, 441 US 369, 99 S Ct 1755 (1979). It found that the cases were factually dissimilar so that that opinion did not control the result in that case. After being advised of his rights, Mr. Butler said "I will talk to you but I am not signing any form." Based on Mr. Butler's conduct, his immediate willingness to enter into conversation with the officers, indicated a waiver of *Miranda* rights. The *Butler* Court found, based on the *Miranda* decision, that a waiver is implied where after a suspect is advised of his rights, there is no express waiver but the suspect immediately and willing makes a statement. *Butler*, 441 US at 372-63.

The *Butler* Court was concerned with the right to counsel holding that the right must be explicitly asserted. Petitioner citing also to *Davis v United States*, 512 US 452 (1994), tries to draw an analogy with the exercise of the right to counsel, but the assertion of the right to remain silent need not be as unequivocal as is required for the assertion of the right to counsel.

In the case at bar, the facts are so markedly different from *Butler* as to take this case out of the ambit of *Butler*. Here, Officer Helgert testified that after trying several interrogation techniques unsuccessfully for 2 hours and 45 minutes, he switched to the "Do-you-believe-in-God?" technique, one he thought might make the defendant vulnerable. Mr Butler eagerly started to talk as soon as he was advised of his rights. Mr. Thompkins remained silent for 2 hours and 45 minutes. These two fact situations are not remotely comparable.

Other courts grappling with this exact issue have found that remaining silent is sufficient to invoke the right to remain silent. The Second Circuit in *United States v Ramirez*, 79 F3d 298, 304 (2nd Cir, 1996), while assuming for the sake of argument that *Davis* applied to the right to remain silent also noted that remaining silent is a sufficient assertion of the right

> A defendant need not rely on talismanic phrases or any special combination of words to invoke his Fifth Amendment right to remain silent. See, e.g., *Quinn v United*

> *States*, 349 US 155, 162-63 ...(1995). We have ruled, for example, that a suspect who acknowledged that he understood his *Miranda* rights by nodding and then remained silent in response to all pedigree questions had thereby sufficiently asserted his right to remain silent.

The Court also pointed out that if it is unclear whether the suspect is invoking his right, the officers are permitted to ask narrow questions only for the purpose of clarifying the ambiguity. Id. In *Ramirez*, the defendant refused to answer 2 questions while answering others. The Court held that this did not constitute a waiver of the right.

In *United States v Wallace*, 848 F2d 1464 (9th Cir, 1988), the Ninth Circuit found that 10 minutes of silence invoked the right to remain silent. The Texas Criminal Appellate Court found that 30-40 minutes of silence was sufficient to invoke the right to remain silent. *Watson v State*, 762 SW2d 591, 597-599 (Tex.Crim.App. 1988) It held that anything done or said by a suspect that could reasonably be interpreted as a desire to invoke the right should be sufficient to halt questioning.

The Petitioner expresses a concern that officers ought to be allowed to have time to talk a defendant into waiving constitutional rights and time to talk a defendant into confessing. The *Miranda* Court was very conscious of the difficult job of law enforcement officers and it noted that its decision in no way precluded officers from using other traditional investigatory techniques, such as talking to witnesses. *Miranda, supra*, at 481. It found the privilege against self incrimination to be a main stay of our adversary system; a part of an "individual's substantive right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *Id* at p 460. The panel in the instant case honored that decision and did not expand its scope.

The panel in this case made no finding that a waiver must be explicit and thus it does not violate the holding *Butler*. It relied on the facts in this case which included a two-hour-and-forty-five minute interrogation period in which this teenaged defendant sat in an interrogation room on a hard chair with two police officers and never engaged in any "meaningful[2]" conversation with them. Rather than respecting his exercise of the privilege against self incrimination, the officers persisted

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2 Detective Helgert used this adjective at the hearing on the motion to suppress.

in their efforts to obtain a confession.

The prosecution did not meet its heavy burden in proving a valid waiver of the right. An objective look at the circumstances proves that appellant was exercising his right to remain silent. To hold otherwise would permit the police to question a defendant indefinitely, wearing down his will in violation of the holdings in *Miranda* and in *Moseley*. The State courts gave inadequate weight to the fact that no waiver of the right was signed, gave inadequate weight to the fact that the defendant remained silent for hours, and gave inadequate weight to the fact no signature was ever obtained on any purported statement.

The State court's decision directly conflicted with the rule in *Miranda* that the police cease interrogation if the suspect "indicates in any manner, at any time...during questioning, that he wishes to remain silent." *Miranda*, 384 US at 473-74. This is a more stringent test than that found in *Davis v United States*, 512 US 452 (1994), for waiving the right to counsel after being advised of the *Miranda* rights. Not talking for over 2 hours is an indication that the defendant is exercising his right to remain silent. Once Mr. Thompkins invoked his right to remain silent by refusing to talk, by remaining uncommunicative, the police were under an obligation to "scrupulously honor" the right to remain silent and to immediately cease all questioning. To hold otherwise condones circumventing the decision in *Miranda*.

After more than two and a half hours of remaining silent, after repeated questioning by two experienced detectives and after being subjected to a spiritual tactic, the defendant's will was overborne. His admissions were the product not of his own free will but of the coercive nature of this interrogation.

B. The Court of Appeals decision falls squarely within firmly established Supreme Court law.

Petitioner cites to *Carey v Musladin*[3] and *Wright v Van Patten*[4] to argue that the Sixth Circuit went beyond the right created by this Court's clearly established law. But petitioner will find little support those cases where principles expressed by this Court were modified by the Courts of Appeals to apply to the case before them.

In *Musladin*, the Ninth Circuit, relying on *Estelle v Williams*, 425 US 501 (1976)(defendant forced to wear prison garb by the State denied a fair trial), held that where family members wore buttons with photos of the deceased at defendant's murder trial he was denied due process. The Supreme Court noted that the *Estelle* case applied only to government-sponsored conduct, not to private conduct and so reversed the Ninth Circuit.

In *Wright*, this Court reversed a Seventh Circuit decision extending the holding in *United States v Cronic*, 466 US 648 (1984)(Prejudice prong of *Strickland* not applicable to complete absence of counsel) to instances where counsel is physically absent but participates via speakerphone. This Court noted that no precedent addressed the presence of counsel over a speakerphone.

Here, no principle had to be modified by the Sixth Circuit to reach the decision it did. The *Miranda* Court's holding that the right to remain silent could be asserted **in any manner** is broad to begin with. The *Moseley* Court's prohibition on persistent questioning encompasses what occurred here. Placing the heavy burden of proving the intentional relinquishment of a known right on the state is squarely within the holdings of *Colorado v Connelly* and *Johnson v Zerbst*

The decision of the Michigan Courts is based on an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States in *Griffin v*

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3 549 US 70 (2006)

4 128 S Ct. 743 (2008).

California, 380 US 609 (1965), *Michigan v Moseley*, *Doyle v Ohio*, and *Miranda v Arizona*, 28 USC 2254 (d)(1). It is contrary to clearly established federal law as determined by the Supreme Court of the United States in the above cases. 28 USC 2254 (d)(1). It also resulted in decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. 28 USC 2254 (d)(2).

This Court should deny the petition for certiorari because the Sixth Circuit Court of Appeals' decision did not expand the *Miranda* decision.

II.

CERTIORARI SHOULD NOT BE GRANTED WHERE THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED THE 28 USC 2254(d) DEFERENCE STANDARD AND ALSO GAVE ADEQUATE DEFERENCE TO THE STATE COURT'S FINDING THAT MR. THOMPKINS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

To find that a defendant's right to the effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show 1) that counsel's performance fell below an objective standard of reasonableness, and 2) that the representation so prejudiced the defendant as to deprive him of a fair trial. As to the second prong, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668; 80 L Ed 2d 674, 694 (1984) In a habeas case, a petitioner must show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *Bell v Cone*, 535 US 685, 699 (2002)

Defendant's theory at trial was that Eric Purifoy was the shooter.

Through the testimony of Frederick France, the surviving victim, Detective Helgert and Eric Purifoy, who the co-defendant and also a witness for the prosecution, the prosecution established that Eric Purifoy had been charged with the same crimes as the defendant, had been charged as an aider and abettor, and had been acquitted of the murder. (Statement of Facts pp 5-6)

In his closing argument, the prosecution started off as follows:

> Ladies and Gentlemen, this is a case about the relationship between these two people. At Eric Purifoy's trial, the jury had to find, in order to find him guilty of first degree murder, that he drove up to that Rite Aid and sat there, thereby assisting Van Thompkins. He sat there and allowed Van Thompkins to shoot someone. .. That is that they had to find to find him guilty. So, what does he do? He twists it and indicates he hits the floor. Because, by hitting the floor he doesn't know what is going on. Is that believable? Did Eric Purifoy's jury make the right decision? ... You are not bound by what his jury found. Take his testimony for what it was...

(Prosecutor's Closing Argument IV 120-121; Apx 71a-72a).

Counsel failed to request, at the time the evidence was offered, a limiting instruction concerning the fact that the alleged accomplice and prosecution witness, Eric Purifoy, was acquitted

of this murder charge and the asse .. charge by a jury; that Eric Purifoy pled guilty to various gun charges, and that the prosecution had charged Purifoy as an aider and abettor to this murder. Counsel also failed to request that a limiting instruction be given during the charge to the jury.

The failure to request a limiting instruction meant that Petitioner' jury could consider Purifoy's gun convictions as substantive evidence of defendant's guilt. The limiting instruction would have directed the jury to consider the evidence only on the issue of Purify's credibility. In Michigan, had the request been made the court would have had to give the instruction pursuant to the decision in People v Allen, 424 Mich 109 (1985)(Upon request, the jury must be given a cautionary instruction that they can only use an accomplice's conviction to assess credibility). See also United States v Ramirez, 973 F2d 102 (2nd Cir, 1992).

The Michigan Court of Appeals and the United States District Court found that counsel's failure to request a limiting instruction met the first prong of the *Strickland* test for ineffective assistance of counsel. (Apx MCOA 55a-56a; USDC 45a-38a). But neither Court found that the prejudice prong had been met.

Petitioner claims that the Sixth Circuit Court of Appeals erred in deciding the prejudice prong because it focused on its own determination of prejudice rather than focusing on whether the state court's decision was unreasonable. However, this claim is erroneous for two reasons. First, a review of the appellate court's decision does not support the contention. The court specifically acknowledged that the defendant had not just the burden of showing prejudice under *Strickland* but also of showing that the appellate court's decision was unreasonable. (Apx; 15a). It then went on to point out that the state court's *Strickland* prejudice analysis was unreasonable because the state court held that prejudice required a showing that the prosecution used Purifoy's conviction for an improper purpose. (Apx; 16a)

The second reason is that although state court findings of fact made in the course of deciding an ineffective assistance of counsel claim are presumptively correct under 28 USC 2254, determinations regarding the adequacy of counsel's performance and prejudice are mixed questions

of law and fact to which the presumption does not apply. Consequently, a reviewing court may independently review the state appellate court's conclusion that the petitioner did receive the effective assistance of counsel. White v McAninch, 235 F3d 988, 995 (6th Cir, 2000).

The error made by counsel prejudiced Petitioner because the evidence was highly contradictory. The shooter was identified as being right-handed by the survivor. Yet two of defendant's witnesses described the defendant as left-handed. The survivor also described the shooter as light-skinned while defendant is dark complicated. Three officers testified that the survivor used the phrase light-skinned to describe the shooter. (Apx 5a). The survivor also failed to pick appellant out of a photo array picking out another person instead. (Apx 4a).

Evidence of an in-court identification based on a problematic show up followed by a failure to identify the defendant at another pre-trial identification procedure is not strong evidence when it merely places the defendant at the scene just as Purify was placed at the scene but was found not guilty of the murder. Nor would the prosecution's adoption of an aiding and abetting theory have been viable since Purify was tried on that theory and not convicted.

If the evidence of Purifoy's conviction was used substantively by the jury because no limiting instruction was requested by counsel then "a reasonable probability exists that the jury understood Purifoy's acquittal as powerful evidence that Thompkins, the only other individual in the front seat of the van, must have been the shooter." (Apx; 16a). Thus prejudice is shown.

Petitioner also contends that a state court has extra latitude in making its determination because the standard of prejudice is a general rule. In *Yarborough v Alvarado*, 541 US 652, 664 (2004), this Court noted that

> Applying a general standard to a specific case can demand a substantial element of judgment. ... The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

But even if this is correct, the judgment which is to be given wide latitude must start with a correct formulation of the principle to be applied. As was shown above, the State court used an incorrect definition of prejudice. That incorrect definition resulted not merely in an incorrect application of

the law, but in an unreasonable application of the law.

The Sixth Circuit Court of Appeals properly deferred to the State Court's decision, but it could not defer to an unreasonable application of firmly established Supreme Court law. This Court should deny the petition for certiorari on this ground.

CONCLUSION

The petition for a writ of certiorari should be denied and the decision of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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DATED: July, 22, 2009

No. 08-1470

In the Supreme Court

of the United States

MARY BERGHUIS, Warden,

Petitioner,

v

VAN CHESTER THOMPKINS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX
IN SUPPORT OF
RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0409p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VAN CHESTER THOMPKINS, JR.,
Petitioner-Appellant,

v.

MARY BERGHUIS, Warden,
Respondent-Appellee.

No. 06-2435

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 05-70188—Patrick J. Duggan, District Judge.

Argued: February 1, 2008

Decided and Filed: November 19, 2008

Before: MOORE, CLAY, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Elizabeth L. Jacobs, LAW OFFICE, Detroit, Michigan, for Appellant. Janet A. VanCleve, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Elizabeth L. Jacobs, LAW OFFICE, Detroit, Michigan, for Appellant. Brad H. Beaver, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. Petitioner-Appellant Van Chester Thompkins, Jr. ("Thompkins") appeals the district court's denial of his petition for a writ of habeas corpus. Following a jury trial in 2002 in Michigan state court, Thompkins was convicted of first-degree murder, assault with intent to commit murder, and several firearms-related charges. After exhausting the state appeals process, Thompkins filed in the United States District Court for the Eastern District of Michigan a petition for a writ of habeas corpus, which the district court denied. The district court certified three claims for appeal: (1) whether Thompkins's confession was obtained in violation of the Fifth Amendment when the police officers questioned Thompkins for nearly three hours, the officers described the interview as "very, very one-sided," and the officers described Thompkins as "not verbally communicative" and as having "shared very limited verbal responses" while "[l]argely . . . remain[ing] silent"; (2) whether Thompkins's right to due process was violated when the prosecution offered evidence of accomplice-witness Eric Purifoy's jury

verdict and guilty plea conviction on charges stemming out of the same incident giving rise to Thompkins's charges; and (3) whether Thompkins was denied effective assistance of counsel when his counsel failed to request that the trial court instruct the jury that it could consider the evidence relating to the jury verdict and guilty-plea conviction of accomplice-witness Purifoy only in evaluating Purifoy's credibility and not as substantive evidence of Thompkins's guilt.

For the reasons discussed below, we **AFFIRM** the district court's denial of Thompkins's petition for a writ of habeas corpus as to his claim of prosecutorial misconduct, but we **REVERSE** the judgment of the district court denying relief as to his Fifth Amendment and ineffective-assistance-of-counsel claims and **REMAND** the case with instructions that the district court order that Thompkins be released from state custody unless the State of Michigan commences a new trial within 180 days of the final federal-court judgment in this case.

I. BACKGROUND

On January 10, 2000, a shooting occurred around 9:00 p.m. in a strip mall parking lot in Southfield, Michigan. Samuel Morris ("Morris") died from multiple gunshot wounds, while his friend Frederick France ("France") survived despite being shot several times. At Thompkins's trial, France testified that he and Morris were driving through the mall parking lot when a group of several men walked in front of their car and began staring at them. Joint Appendix ("J.A.") at 264-65 (Trial Tr. 5/13/2002 at 197-98). France testified that he and Morris got out of their car and that France and Thompkins exchanged words as Thompkins and the others in his group approached a white and blue van. J.A. at 270-73 (Trial Tr. 5/13/2002 at 204-07). Morris and France reentered their car and began driving away, but the van soon pulled up alongside them so that the passenger-side window of the van was adjacent to the driver-side window of Morris and France's car. J.A. at 273-81 (Trial Tr. 5/13/2002 at 207-215). France testified that he had no doubt that Thompkins was seated in the passenger seat of the van and that Thompkins said "What you say, Big Dog" immediately before drawing a gun and firing several shots into Morris and France's car. J.A. at 280-81 (Trial Tr. 5/13/2002 at 214-15). The next day, while France was in the hospital, two police officers showed him a photograph taken by a security camera inside Lou's Deli, a store at the mall where the shooting occurred, and France identified three individuals as being respectively the shooter, the driver, and another passenger in the van. J.A. at 287-89 (Trial Tr. 5/13/2002 at 230, 232, 237). France identified Thompkins as the shooter. J.A. at 288 (Trial Tr. 5/13/2002 at 232).

The police focused their investigation into the shooting on three men, Thompkins, Eric Purifoy ("Purifoy"), and Myzell Woodward ("Woodward"). Woodward, who contacted the police shortly after the incident, apparently was never charged. Pet'r Br. at 6. Purifoy turned himself in to the police, and he was tried in August 2000 on the same charges as would later be brought against Thompkins. J.A. at 289 (Trial Tr. 5/13/2002 at 237); J.A. at 345-47 (Trial Tr. 5/16/2002 at 85-87). Purifoy was acquitted of the murder and assault charges, convicted of carrying a concealed weapon, and after his trial Purifoy pleaded guilty to three further firearm-related counts. J.A. at 345-47 (Trial Tr. 5/16/2002 at 85-87).

Thompkins was not found until over a year after the shooting when he was arrested along with three other men near Columbus, Ohio, on February 19, 2001. J.A. at 319-20, 331-32 (Trial Tr. 5/16/2002 at 35-36, 55-56). Thompkins attempted to escape while the officers were handcuffing the others and, when recaptured, gave the officers various false pieces of identification and insisted that his name was Detniuan Isiah Reed. J.A. at 324-25, 328-29 (Trial Tr. 5/16/2002 at 42-43, 52-53). When Thompkins was fingerprinted at the Franklin County (Ohio) jail, the results revealed his true identity as Van Chester Thompkins, Jr. J.A. at 331-32 (Trial Tr. 5/16/2002 at 55-56).

On February 22, 2001, Detective Christopher Helgert ("Helgert") from the Southfield (Michigan) Police Department interrogated Thompkins at the jail in Ohio. J.A. at 149 (Op. & Order

Denying Mot. to Suppress at 1). At a hearing in October 2001 regarding Thompkins's motion to suppress statements that he made during the February 2001 interrogation, Helgert testified that he and his partner interviewed Thompkins for approximately three hours. J.A. at 213-14 (Supp. Hr'g Tr. at 78-79). Helgert read Thompkins a form that advised him of his *Miranda* rights and got Thompkins to confirm orally his understanding of those rights, but Thompkins refused to sign the form acknowledging that the officers had read him his rights. J.A. at 214-15, 220-23 (Supp. Hr'g Tr. at 79-80, 85-88). Helgert described the interview as "very, very one-sided," J.A. at 217 (Supp. Hr'g Tr. at 82), and as "nearly a monologue," J.A. at 227 (Supp. Hr'g Tr. at 92). Helgert described Thompkins as "so uncommunicative," J.A. at 217 (Supp. Hr'g Tr. at 82), as "not verbally communicative," J.A. at 227 (Supp. Hr'g Tr. at 92), and remarked that "[l]argely, he remained silent," J.A. at 229 (Supp. Hr'g Tr. at 94). Helgert also stated that "Mr. Thompkins shared very limited verbal responses with us," J.A. at 217 (Supp. Hr'g Tr. at 82), and that Thompkins "talk[ed] with us very sporadically," J.A. at 216 (Supp. Hr'g Tr. at 81). Asked whether Thompkins had "consistently exercised his right to remain substantively silent for at least two hours and forty-five (45) minutes," Helgert replied "Yes, that's right." J.A. at 232 (Supp. Hr'g Tr. at 97). On re-direct, Helgert stated that occasionally Thompkins gave both verbal and non-verbal responses to the questions and that he understood Thompkins's "eye contact," "a nod of the head," and "look[ing] up" as engaging in limited conversation. J.A. at 236-37 (Supp. Hr'g Tr. at 101-02). Helgert also testified that "I don't know" was a "quite prevalent" response to his questions, as well that "[s]ometimes [Thompkins's response] would be a word or two. A 'yeah,' or a 'no,' or 'I don't know.'" J.A. at 233, 236 (Supp. Hr'g Tr. at 98, 101).

After two hours and forty-five minutes of the "very, very one-sided" interview, Helgert "tried to take a different tac[k], I guess what I call a spiritual tac[k]," and he asked Thompkins "whether or not he believed in God." J.A. at 217 (Supp. Hr'g Tr. at 82). Helgert testified that Thompkins

> made eye-contact with me for one of the few times that he did for the interview. I saw his eyes well up with tears. He answered me orally and said, "Yes."
>
> I asked if he had prayed to God? And he said "Yes."
>
> And I asked him if he had asked God to forgive him for—I believe the words were, and I quoted them in my report verbatim "shooting that boy down." And he answered, "Yes."

J.A. at 218 (Supp. Hr'g Tr. at 83). Helgert testified that Thompkins "refuse[d] to write anything," that Thompkins "wouldn't touch the pen or paper that my partner placed in front of him," and that shortly after this exchange the interview was terminated. J.A. at 218-19 (Supp. Hr'g Tr. at 83-84). On May 10, 2002, the Michigan state court denied Thompkins's motion to suppress his statements, reasoning that Thompkins "never invoked his right to remain silent, and participated in the interview by making eye contact, nodding, and answering questions with, 'I don't know.'" J.A. at 152 (Order Denying Mot. to Suppress at 4).

On May 13, 2002, Thompkins's trial began before a jury in the Oakland County Circuit Court, and Thompkins states that "[t]he defense theory was that Eric Purifoy was the shooter and that [Thompkins] was merely present." Pet'r Br. at 7. The prosecution presented the testimony of several witnesses who saw or heard parts of the altercation and shooting in the mall parking lot. *See* Resp't Br. at 6-8. France testified about the interactions leading up to the shooting; he also testified about identifying Thompkins as the shooter and Purifoy as the driver after seeing photographs of them the day after the shooting when France was in the hospital. J.A. at 287-88 (Trial Tr. 5/13/2002 at 231-32). The prosecution also asked France about what he knew about Purifoy's trial, and France responded that Purifoy "got charged, but he got found not guilty on having anything to do with this," with the prosecution confirming that "this" involved "[t]he murder." J.A. at 289 (Trial Tr. 5/13/2002 at 237). On cross-examination, France stated that at some point police officers had presented him

with a photo-lineup in which he picked out a person other than Thompkins. J.A. at 295-97 (Trial Tr. 5/14/2002 at 48-50).

The prosecution offered the testimony of Omar Stephens ("Omar"),[1] who stated that he and Thompkins were friends and that he had a sister named Tamika. J.A. at 307-11 (Trial Tr. 5/16/2002 at 5-9). Omar stated that he and Tamika had a phone conversation with Thompkins approximately one month after the shooting, after Omar saw Thompkins's picture on television. J.A. at 308-10 (Trial Tr. 5/16/2002 at 6-8). Omar testified that Thompkins explained that the shooting victims "got into it" and that "[h]e just told . . . me he had to pop them up." J.A. at 311 (Trial Tr. 5/16/2002 at 9). Omar also testified that around the time of the shooting Thompkins had been driving a van matching the description of the van used in the shooting. J.A. at 312-13 (Trial Tr. 5/16/2002 at 10-11).

The prosecution called Purifoy as a witness, but he initially refused to testify, stating that he had "been advised to take the Fifth Amendment Right as far as anything concerning January 10th." J.A. at 343 (Trial Tr. 5/16/2002 at 73). After conferring with his attorney, Purifoy changed his mind and later decided to testify. J.A. at 375-76 (Trial Tr. 5/16/2002 at 153-54).[2] Purifoy stated that on January 10, 2000, Thompkins drove Purifoy and Woodward to the mall and Lou's Deli. J.A. at 379-82 (Trial Tr. 5/16/2002 at 160, 164-66). Because Thompkins was unfamiliar with the area, Purifoy gave him directions and, after the group finished eating, Purifoy claimed that he took the keys to Thompkins's van for the return drive because they "had some problems getting there." *Id.* at 382. Purifoy also described the shooting, stating that Thompkins was in the passenger seat when Purifoy pulled the van alongside Morris and France's car but that when Purifoy heard shots, he and Thompkins ducked down. J.A. at 383-91 (Trial Tr. 5/16/2002 at 167-71, 174-77). Purifoy testified that after the shots were fired he looked up and saw a gun in Thompkins's hand. J.A. at 390-91 (Trial Tr. 5/16/2002 at 176-77). The prosecution requested that the court take judicial notice that Purifoy had not received immunity for his testimony. J.A. at 401-02 (Trial Tr. 5/16/2002 at 188-89). The prosecution introduced letters written by Purifoy to Thompkins and read aloud a portion of one letter referring to Myzell Woodward, the third person in the van on the night of the shooting. The prosecution stated to Purifoy that "[y]ou know that he [Woodward] has been—he is being looked at with respect to a murder in Ohio, where he faces potentially the death penalty." J.A. at 405 (Trial Tr. 5/16/2002 at 215). The prosecution asked Purifoy about what happened at his own trial regarding these events, and Purifoy replied that "I was acquitted of the Murder charge and found guilty on Weapons Charges." J.A. at 401 (Trial Tr. 5/16/2002 at 188).

The prosecution presented the testimony of Detective Helgert, eliciting testimony from Helgert regarding the outcome of Purifoy's jury trial in which he was acquitted on murder charges arising out the same events underlying the charges in this trial. J.A. at 345-47 (Trial Tr. 5/16/2002 at 85-87). Helgert also stated that Purifoy "was charged under the theory that he was an Aider and Abettor." J.A. at 346 (Trial Tr. 5/16/2002 at 86). Helgert then testified about the interrogation of Thompkins that took place in Ohio in February 2001. J.A. at 355-66 (Trial Tr. 5/16/2002 at 100-11).

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[1] The record contains some uncertainty as to whether Omar's last name is Stephens or Allen. J.A. at 426-27 (Trial Tr. 5/17/2002 at 83-84) (witness referring to "Omar Allen"), *see also* J.A. at 156-61 (Affidavits of Kenneth Lee and Omar Allen) (asserting that Omar's last name is Allen and that "[h]is testimony in court that Thompkins had confessed to him was a total lie").

[2] Prior to Purifoy's testimony, the prosecution moved to exclude several letters that Purifoy wrote to Thompkins, arguing that the defense had produced them only the preceding day. J.A. at 179 (Fed. Dist. Ct. Op. & Order Denying Habeas Pet. at 6). In response, the defense claimed that it had not decided whether to introduce the letters and had received them only the night before the trial. *Id.* The parties ultimately resolved the matter off-the-record and the prosecution decided to enter the letters into evidence. after Purifoy testified, the trial judge read a prepared statement to the jury. *See* J.A. at 179, 194-95 (Op. at 6, 21-22).

He testified that "[m]y partner and I did most of the talking in that interview," J.A. at 359 (Trial Tr. 5/16/2002 at 104), and that Thompkins "spent a lot of his time sitting . . . simply holding his head looking down," J.A. at 364 (Trial Tr. 5/16/2002 at 109). Helgert stated that "I remember two things that he did say, he said 'He didn't want a peppermint' that my partner offered him and 'the chair that he was sitting in was hard.'" *Id.* Helgert explained that his interrogation tactics included "using the ostrich head in the sand metaphor. 'How do you think this is going to turn out for you?' 'You need to help yourself, you need to put forth an explanation.' 'People are going to want to hear from you.'" J.A. at 360-61 (Trial Tr. 5/16/2002 at 105-06). Helgert testified that "[n]one of that generated any significant response," that it "wasn't productive," and that the questions did not elicit "any admissions or denials, for that matter, it didn't really illicit [sic] any sort of reaction." J.A. at 361, 363 (Trial Tr. 5/16/2002 at 106, 108).

Helgert stated that "there were several times I had to direct his attention back to me to make eye contact with me." J.A. at 363-64 (Trial Tr. 5/16/2002 at 108-09). Describing his questions near the end of the three-hour interview, Helgert recalled that "[t]he last theme I employed" was his "spiritual tac[k]," in which he "appeal[ed] to somebody's sense of morality or religion." J.A. at 364-65 (Trial Tr. 5/16/2002 at 109-10); J.A. at 217 (Supp. Hr'g Tr. at 82). This theme elicited several answers of "Yes" from Thompkins to questions about whether Thompkins believed in God, prayed, and had prayed for forgiveness for "shooting that boy down." J.A. at 365 (Trial Tr. 5/16/2002 at 110). Helgert stated that his partner placed a tablet of paper and a pen in front of Thompkins, but Thompkins "never touched" them. J.A. at 365-66 (Trial Tr. 5/16/2002 at 110-11).

Two Southfield police officers testified for the defense, Stacey Vida ("Vida") and Keith Wing ("Wing"). Vida testified that when she interviewed France at the hospital he told her that the shooter was a light-skinned black male.[3] J.A. at 417 (Trial Tr. 5/17/2002 at 20). Wing also testified that France described the shooter as light-skinned. J.A. at 419, 421 (Trial Tr. 5/17/2002 at 46, 60). The defense presented testimony from Tamika Stephens, who denied that she was related to Omar Stephens/Allen and stated that she had been Thompkins's girlfriend for six years. J.A. at 425-26 (Trial Tr. 5/17/2002 at 82-83). Tamika testified that Omar did not have any telephone conversations with Thompkins in her presence. J.A. at 427-28 (Trial Tr. 5/17/2002 at 84-85). Finally, Tamika and Thompkins's cousin Lakeisha Mallory testified that Thompkins is left-handed. J.A. at 430, 434 (Trial Tr. 5/17/2002 at 87, 107). France, the surviving victim of the shooting, had earlier testified that the shooter used his right hand to pull the trigger. J.A. at 293 (Trial Tr. 5/14/2002 at 25).

When the case was submitted to the jury, the court did not give an instruction informing the jury that it could use the evidence regarding the result of co-defendant Purifoy's jury trial only to assess Purifoy's credibility, but Thompkins's counsel did not request such an instruction or object to its absence. The jury convicted Thompkins on all charges, and Thompkins appealed to the Michigan Court of Appeals, which affirmed his convictions in February 2004. J.A. at 163-67 (Mich. Ct. App. Op.). The Michigan Court of Appeals held that "the record does not demonstrate that defendant asserted his right to remain silent" and that because Thompkins "continued to talk with the officer, albeit sporadically . . . [t]he trial court did not clearly err in concluding that defendant voluntarily waived his right to remain silent and that he did not subsequently invoke his right to silence." J.A. at 163-64 (Op. at 1-2). The court noted that plain-error review applied to Thompkins's claims of prosecutorial misconduct regarding the references to the jury verdict in Purifoy's trial because Thompkins's counsel failed to object contemporaneously, and the court held that any errors that may have occurred did not result in prejudice warranting reversal. J.A. at 164-65 (Op. at 2-3). The court rejected Thompkins's claim of ineffective assistance because it found no prejudice. J.A. at 165-66 (Op. at 3-4). In particular, the court observed that "[a]lthough the [trial] court did not specifically instruct the jury that it could consider Purifoy's conviction only for

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[3] Thompkins has a "'[d]ark brown' complexion." J.A. at 294 (Trial Tr. 5/14/2002 at 27).

purposes of his credibility, the record does not disclose an attempt to argue that conviction for an improper purpose." J.A. at 166 (Op. at 4). In July 2004, the Michigan Supreme Court denied Thompkins's application for leave to appeal the judgment of the Michigan Court of Appeals. J.A. 168 (Mich. Sup. Ct. Order).

In January 2005, Thompkins filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Michigan. J.A. at 4-75 (Petition for Writ of Habeas Corpus & Brief in Support). The district court denied Thompkins's petition in September 2006. J.A. at 174-206 (U.S. Dist. Ct. Op. & Order Denying Habeas Pet.) Thompkins filed a Notice of Appeal in October 2006, J.A. at 208 (Notice of Appeal), and the district court granted a partial certificate of appealability as to the three issues summarized above. J.A. at 457-59 (Order Granting COA).

II. ANALYSIS

A. Standard of Review

Thompkins seeks relief pursuant to 28 U.S.C. § 2254, which, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) ("AEDPA"), provides that

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(1)-(2).

The Supreme Court has explained that "[a] state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Terry Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state-court decision is also "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Id.* at 412-13. A state court's decision is an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[C]learly established law under [AEDPA] encompasses more than just bright-line rules laid down by the [Supreme] Court. It also clearly includes legal principles and standards enunciated in the Court's decisions." *Taylor v. Withrow*, 288 F.3d 846, 850-51 (6th Cir.), *cert. denied*, 537 U.S. 1007 (2002). "The lack of an explicit statement" of a rule "is not determinative" because "[t]he Court has made clear that its relevant precedents include not only bright-line rules but also the legal principles and standards flowing from precedent." *Id.* at 852; *see also Panetti v. Quarterman*, 127 S. Ct. 2842, 2858 (2007) ("AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'") (quotation omitted).

We review the district court's legal conclusions de novo and its factual findings for clear error. *Moss v. Hofbauer*, 286 F.3d 851, 858 (6th Cir.), *cert. denied*, 537 U.S. 1092 (2002). We review the state court's determination of mixed questions of fact and law under the "unreasonable application" prong. *Barnes v. Elo*, 339 F.3d 496, 501 (6th Cir. 2003), *cert. denied*, 540 U.S. 1164

(2004). AEDPA "establish[es] a presumption that a state court's determination of a factual issue is correct, and mandat[es] that '[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.'" *Moss*, 286 F.3d at 858-59 (quoting 28 U.S.C. § 2254(e)(1)). "In applying AEDPA, we look to the last state-court decision on the merits, which in this case is the decision of the [Michigan] Court of Appeals." *Garcia v. Andrews*, 488 F 3d 370, 374 (6th Cir.), *cert denied*, 128 S. Ct. 493 (2007).

B. Thompkins's Fifth Amendment Claim

Thompkins argues that the introduction at his trial of the statements that he made near the end of the three-hour long interrogation session conducted by Detective Helgert violated the Fifth Amendment. Thompkins contends that he had effectively invoked his right to remain silent by being—in the words that Helgert used at the hearing on Thompkins's Motion to Suppress—"so uncommunicative," J.A. at 217 (Supp. Hr'g Tr. at 82), "not verbally communicative," J.A. at 227 (Supp. Hr'g Tr. at 92), and by "[l]argely . . . remain[ing] silent," J.A. at 229 (Supp. Hr'g Tr. at 94). Further, when Thompkins's attorney asked Helgert whether Thompkins "had consistently exercised his right to remain substantively silent for at least two hours and forty-five (45) minutes," Helgert replied "Yes, that's right." J A. at 232 (Supp. Hr'g Tr. at 97).

The district court denied Thompkins's Fifth Amendment claim because it found that the Michigan state court—which held that Thompkins did not "assert[] his right to remain silent" because "he continued to talk with the officer, albeit sporadically" such that Thompkins "voluntarily waived his right to remain silent," J.A. at 163-64 (Mich. Ct. App. Op. at 1-2)—did not unreasonably apply clearly established federal law as determined by the Supreme Court or base its decision on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. J.A. 202-03 (Op. at 29-30). Noting that "[t]he prosecution has the burden of establishing a knowing and intelligent waiver of the rights," Thompkins argues that "[t]he prosecution did not meet its heavy burden in proving a valid waiver of the right" to remain silent given Detective Helgert's repeated descriptions of Thompkins as silent and uncommunicative and Helgert's inability to identify answers to specific questions that Thompkins made in the first two hours and forty-five minutes of the interview. Pet'r Br. at 15, 22, 21. Thompkins thus contends that the state court's decision involved both an "unreasonable application of clearly established federal law" and "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." Pet'r Br. at 22 (citing § 2254(d)(2)).

We agree with Thompkins and reverse the district court's denial of his petition because the state-court's decision involved both "an unreasonable application of[] clearly established Federal law" and "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2)

1. Clearly Established Federal Law Regarding Waiver and Invocation of a Suspect's Right to Remain Silent

In *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), the Supreme Court held that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination." The Supreme Court has explained that "[t]he critical safeguard" provided by the *Miranda* warnings is the knowledge of "a person's 'right to cut off questioning.'" *Michigan v. Mosley*, 423 U.S. 96, 103 (1975) (quoting *Miranda*, 384 U.S. at 474). Therefore, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored'" *Id.* at 103-04 (quoting *Miranda*, 384 U.S. at 474, 479).

In determining whether a suspect has waived her *Miranda* rights, the Supreme Court has held that that "[t]he courts must presume that a defendant did *not* waive his rights; *the prosecution's burden is great.*" *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (emphases added). Further, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda*, 384 U.S. at 475. In *Butler*, the Supreme Court re-affirmed its holding in *Carnley v. Cochran*, 369 U.S. 506, 516 (1962), that "[p]resuming waiver from a silent record is impermissible," but the Court did state in *Butler* that "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Butler*, 441 U.S. at 373 & n.4. The Court in *Butler* quoted two crucial passages from its opinion in *Miranda*, observing that in *Miranda*

> this Court said: "If the interrogation continues without the presence of an attorney and a statement is taken, a *heavy burden* rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."
>
> The Court's opinion went on to say: "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. *But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.*"
>
> Thus, the Court held that an express statement can constitute a waiver, and that silence alone after such warnings cannot do so. But the Court did not hold that such an express statement is indispensable to a finding of waiver.

Butler, 441 U.S. at 372-73 (quoting *Miranda*, 384 U.S. at 475) (internal citations omitted) (emphases added). The Court's *Miranda* opinion emphasized that "[t]he requirement of warnings and waiver of rights is [] fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Miranda*, 384 U.S. at 476. Finally, the Supreme Court has cautioned that "[i]nvocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." *Smith v. Illinois*, 469 U.S. 91, 98 (1984).

In terms of a suspect's invocation of her right to remain silent, in *Miranda* the Supreme Court held that "[i]f the individual *indicates in any manner*, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74 (emphasis added). Although the Supreme Court has not addressed what conduct or statements suffice to "indicate[] in any manner" one's intent to invoke the right to remain silent, the Supreme Court has explained the standard governing the invocation of one's right *to counsel*. In *Davis v. United States*, 512 U.S. 452, 455 (1994), the Supreme Court noted that the suspect "waived his rights to remain silent and to counsel, both orally and in writing." Approximately an hour and a half into the interview, the suspect stated that "'[m]aybe I should talk to a lawyer.'" *Id.* at 455. After the investigating agents sought clarification as to whether the suspect wanted a lawyer, the suspect said "'No, I don't want a lawyer.'" *Id.* Rejecting the defendant's argument that his statement that "[m]aybe I should talk to a lawyer" effectively invoked his right to counsel such that the interrogation should have ceased and his statements been suppressed, the Supreme Court held that to invoke one's right to counsel "the suspect must unambiguously request counsel" because the Court's "precedents do not require the cessation of questioning" "if a suspect makes a reference to an attorney that is ambiguous or equivocal." *Id.* at 459. The Court specifically restated its holding as establishing "that, *after a knowing and voluntary waiver* of the *Miranda* rights, law enforcement officers may *continue* questioning until and unless the suspect clearly requests an attorney." *Id.* at 461 (emphases added).

In terms of our review of the distinct waiver and invocation inquiries, "[a]lthough the ultimate question of whether [the suspect's] waiver was knowing and intelligent is subject to review

under the standards set forth in section 2254(d), any subsidiary factual findings made by the state court are entitled to a presumption of correctness under section 2254(e)." *Valdez v. Ward*, 219 F.3d 1222, 1231 (10th Cir. 2000) (internal citation omitted); *see also Williams v. Jones*, 117 F. App'x 406, 412 (6th Cir. 2004) (unpublished) (citing *Valdez*); *United States v. Rodriguez*, 518 F.3d 1072, 1076 (9th Cir. 2008) ("This court reviews a trial court's legal conclusions on *Miranda* waivers de novo, and findings of fact underlying those conclusions for clear error."); *United States v. Carter*, 489 F.3d 528, 534 (2d Cir. 2007) ("We review a district court's determination regarding the constitutionality of a *Miranda* waiver *de novo* and a district court's underlying factual findings for clear error."). In the invocation "context, we review the district court's factual findings concerning the words a defendant used to invoke his *Miranda* rights for clear error and whether the words actually invoked those rights de novo." *Rodriguez*, 518 F.3d at 1076.

In denying Thompkins's petition, the district court quoted a First Circuit case that "'concluded that *Davis* applies to both components of *Miranda*: the right to counsel and the right to remain silent'" and accordingly analyzed the record to determine whether Thompkins "clearly and unequivocally invoked his right to remain silent after Helgert advised him of his *Miranda* rights." J.A. at 201-02 (Op. at 28-29) (quoting *Bui v. DiPaola*, 170 F.3d 232, 239 (1st Cir. 1999)).[4]

2. The Michigan State Courts' Adjudication of Thompkins's Fifth Amendment Claim

In denying Thompkins's motion to suppress, the Michigan trial court rejected Thompkins's argument that his silence and general uncooperativeness during the three-hour long interview were "repeated implicit invocations of his right to silence" and instead found that "[t]he defendant never invoked his right to remain silent." J.A. at 151-52 (Order Denying Mot. to Suppress at 3-4). As to the initial issue of whether Thompkins waived his rights, the trial court observed that the officers advised Thompkins of his rights, but that he refused to sign the form. The trial court concluded that Thompkins "knowingly and intelligently waived his rights" because he "never invoked his right to remain silent, and participated in the interview by making eye contact, nodding, and answering questions with, 'I don't know.'" *Id.* at 152.

The Michigan Court of Appeals affirmed, and the entirety of its analysis regarding Thompkins's Fifth Amendment claim is quoted below:

> Defendant argues that the trial court erred by denying his motion to suppress his statements to the police. Defendant asserts that the police improperly continued to interrogate him after he "implicitly" invoked his right to remain silent by failing to answer the officers' questions. We disagree.
>
> The record discloses that defendant was advised of his *Miranda* rights and, according to the interrogating officer, verbally acknowledged that he understood those rights. Contrary to defendant's argument, the record does not demonstrate that defendant asserted his right to remain silent. Although defendant refused to sign the advice of rights form, he continued to talk with the officer, albeit sporadically. He answered questions with brief responses, or by nodding his head, but never said he did not want to talk or that he was not going to say anything. "When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant

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[4] Thompkins contends that lower courts are in conflict regarding whether the *Davis* "unambiguous request" standard for invoking the right to counsel affects the analysis of whether an individual has invoked the right to remain silent. Pet'r Br. at 18-22. Because the resolution of this issue is not critical to the outcome in this case—that is, we conclude that the prosecution failed to meet its "heavy burden" in first showing that Thompkins *waived* his *Miranda* rights—we need not address Thompkins's arguments that the *Davis* standard does not apply to invoking the right to remain silent.

> of a right to remain silent." The trial court did not clearly err in concluding that defendant voluntarily waived his right to remain silent and that he did not subsequently invoke his right to silence. Defendant's statements were properly admitted into evidence.

J.A. 163-64 (Mich. Ct. App. Op. at 1-2) (footnote and citations to Michigan case law omitted).

The state court's adjudication of Thompkins's Fifth Amendment claim both involved an unreasonable determination of the facts in light of the evidence presented and also unreasonably applied clearly established federal law. That is, the state court's analysis failed to pay proper heed to the Supreme Court's holding that "[t]he courts must presume that a defendant did not waive his rights; the prosecution's burden is great." *Butler*, 441 U.S. at 373; *see also Miranda*, 384 U.S. at 475 ("[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination."). Furthermore, the record contradicts the finding that Thompkins "continued to talk with the officer, albeit sporadically." We consider the factual determination first, as it underlies the legal determinations.

The Michigan Court of Appeals's finding that Thompkins "continued to talk with the officer, albeit sporadically" lacks support in the record. Certainly, Helgert at one point testified that Thompkins "talk[ed] with us very sporadically," J.A. at 216 (Supp. Hr'g Tr. at 81), but Helgert identified essentially *no* specific statements that Thompkins made. At the suppression hearing, Helgert testified that during the first two hours and forty-five minutes of the interrogation Helgert was "just repeating that theme [and b]eing really quite repetitious in the monologue, 'This is your opportunity to talk. What do you think is going to happen? Who is going to speak up for you if you don't speak up for yourself?'" J.A. 233 (Supp. Hr'g Tr. at 98). When the prosecution asked Helgert how Thompkins responded to this monologue, Helgert offered vague testimony that "sometimes [Thompkins's response] would be eye-contact, sometimes it would be a nod of the head, sometimes, I know the words, 'I don't know' was quite prevalent," while also admitting that Thompkins "sat there and listened to our speech, if you will, most of the time." J.A. at 233, 234 (Supp. Hr'g Tr. at 98, 99). Helgert *never* identified any specific question or questions to which Thompkins made his "responses" of eye-contact, head nods, or use of the phrase "I don't know." Indeed, Helgert even admitted that when he tried his "spiritual tac[k]" near the end of the interrogation, Thompkins then "made eye-contact with me *for one of the few times* that he did for the interview." J.A. at 218 (Supp. Hr'g Tr. at 83) (emphasis added). Helgert's testimony thus demonstrates that Thompkins rarely even made eye contact with the officers. At trial, Helgert stated that "I remember two things that he did say, he said 'He didn't want a peppermint' that my partner offered him and 'the chair that he was sitting in was hard.'" J.A. at 364 (Trial Tr. 5/16/2002 at 109).

Given that the above constituted the total of Thompkins's responses to the first two hours and forty-five minutes of the interrogation, the Michigan Court of Appeals's finding that Thompkins "talk[ed] with the officer, albeit sporadically" simply misrepresents the record. Rather, Helgert's testimony demonstrates that the interrogation was "very, very one-sided," J.A. at 217 (Supp. Hr'g Tr. at 82), "nearly a monologue," J.A. at 227 (Supp. Hr'g Tr. at 92), and that Thompkins was "uncommunicative," J.A. at 217 (Supp. Hr'g Tr. at 82), and "not verbally communicative," J.A. at 227 (Supp. Hr'g Tr. at 92). Most revealingly, *three times* Thompkins's counsel asked Helgert variations of a question regarding whether Thompkins remained silent during the first two-plus hours of the interrogation, and each time Helgert confirmed that Thompkins had done so. *See* J.A. at 229, 231, 232 (Supp. Hr'g Tr. at 94, 96, 97).[5] Contrary to the state court's statement, the evidence

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[5] Specifically, the first question asked Helgert whether "consistently for two hours and fifteen (15) minutes every time you gave [Thompkins] an opportunity to participate meaningfully in the conversation he exercised his right to remain silent," and Helgert replied that "[l]argely he remained silent, that's correct." J.A. at 229 (Supp. Hr'g Tr. at 94). The second question asked Helgert whether Thompkins "exercised [his right to remain silent] continuously for two

demonstrates that Thompkins was silent for two hours and forty-five minutes. Indeed, the only evidence of Thompkins's participation consists of his declining a peppermint, complaining about his chair, and occasionally nodding his head or responding "I don't know" to *unidentified* questions, and these actions do not amount even to "sporadic" conversation with the officers. To disregard a state court's factual determination, "the state court's factual determination must be 'objectively unreasonable' in light of the evidence presented during the state proceedings," and this is such a case. *Dennis v. Mitchell*, 354 F.3d 511, 518 (6th Cir. 2003).

The state court also unreasonably applied clearly established federal law insofar as the court viewed such scant evidence of Thompkins's participation during the interrogation as demonstrating that Thompkins voluntarily waived his right to remain silent given the Supreme Court's command that "[t]he courts must presume that a defendant did not waive his rights; the prosecution's burden is great." *Butler*, 441 U.S. at 373; *see also Miranda*, 384 U.S. at 475 (stating that a "heavy burden rests on the government" to prove waiver). Helgert's vague testimony regarding Thompkins's "responses" during the interrogation—responses consisting of eye contact, head nods, declining a peppermint, complaining about his chair, and occasional statements of "I don't know"—does not suffice to meet the state's "great" burden of showing that Thompkins waived his right to remain silent. The Supreme Court's opinion in *Miranda* specifically addressed this *precise* issue: "*[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.*" *Miranda*, 384 U.S. at 475 (emphasis added); *see also United States v. Upton*, 512 F.3d 394, 399 (7th Cir. 2008) ("Waiver can never occur through 'mere silence,' as the *Miranda* warnings themselves indicate.") (citing *Butler*, 441 U.S. at 373). In addition, Thompkins refused to sign even the *advice* of rights form, which purports only to show a suspect's acknowledgment that officers had read the rights and not that the suspect was waiving the rights. The Supreme Court's opinion in *Butler* clearly permits implied waivers of *Miranda* rights, but a suspect's uncooperativeness or refusal to sign even an advice of rights form certainly has relevance to determining whether Thompkins waived his rights. *Butler*, 441 U.S. at 374 ("[T]he question of waiver must be determined on 'the particular facts and circumstances surrounding th[e] case, including the background, experience, and conduct of the accused.'") (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Had Helgert identified any particular exchange involving an instance of eye contact or a head nod, the issue of whether the prosecution had satisfied its "heavy burden" of showing "a course of conduct indicating waiver" would be entirely different. Helgert described his questioning as similar to a "monologue" propounding on the "theme" that this was Thompkins's opportunity to tell his side of the story. Crucially, Helgert described Thompkins's conduct throughout the first two and half hours of the interview as generally "shar[ing] very limited verbal responses with us," J.A. at 217 (Supp. Hr'g Tr. at 82), as "remain[ing] silent," J.A. at 229 (Supp. Hr'g Tr. at 94), and as "not very cooperative or responding," J.A. at 228 (Supp. Hr'g Tr. at 93). Helgert described Thompkins's "limited" conduct of making a "nod of the head" or a "'yeah,' or a 'no,' or 'I don't know'" without providing *any* context. J.A. at 236-37 (Supp. Hr'g Tr. at 101-02). Had Helgert testified that Thompkins nodded his head in response to a question asking whether Thompkins wanted his side of the story to be known, such testimony would obviously be powerful evidence of waiver; a head nod in response to a question asking whether Thompkins was comfortable declining to exercise his opportunity to tell his side of the story (or a "no" to a question about whether Thompkins wished to tell his story) would present an entirely different situation. Without the context of Thompkins's occasional eye contact or head nods, we cannot say that Thompkins's conduct indicated a waiver

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hours and forty-five (45) minutes in terms of substantive responses to your attempts to elicit statements regarding his offense, is that fair to say?," and Helgert responded "[m]uch of the time. Most of the time, yes." J.A. at 231 (Supp. Hr'g Tr. at 96). Finally, the third question inquired whether Thompkins's statements responding to Helgert's "spiritual tac[s]" of questioning came "after [Thompkins] had consistently exercised his right to remain substantively silent for at least two hours and forty-five (45) minutes?," and Helgert answered "Yes, that's right." J.A. at 232 (Supp. Hr'g Tr. at 97).

of his rights; to the contrary, refusing to sign even an advice of rights form, being "so uncommunicative," J.A. at 217 (Supp. Hr'g Tr. at 82), "remain[ing] silent," J.A. at 229 (Supp. Hr'g Tr. at 94), and "spen[ding] a lot of his time sitting . . . simply holding his head looking down," J.A. at 364 (Trial Tr. 5/16/2002 at 109), form a course of conduct that powerfully suggests Thompkins did *not* waive his rights.

Thompkins's conduct also contrasts markedly to the behavior of defendants in cases where courts have found implied waivers. For instance, in *United States v. Upton*, 512 F.3d 394, 399 (7th Cir. 2008), the Seventh Circuit found that the defendant "impliedly waived his *Miranda* rights before he confessed" even though "he did not sign an acknowledgment form" because the defendant "freely talk[ed] about the allegations against him, admitting they were true but attempting to strike a deal." The Seventh Circuit also stated that "[w]aiver can *never* occur through 'mere silence,' as the *Miranda* warnings themselves indicate." *Id.* Similarly, in *United States v. Younger*, 398 F.3d 1179, 1186 (9th Cir. 2005), the Ninth Circuit affirmed a district court's finding of "an implied waiver . . . based on evidence that after Officer Hall advised defendant of his *Miranda* rights but before questioning him, defendant made a spontaneous statement and responded to further questioning without reference to counsel." In *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000), the Fourth Circuit denied a certificate of appealability in a case in which the Virginia Supreme Court found an implied waiver given that the defendant "initiated a conversation" with the detective and "stated that he understood his rights and wanted to talk to" the detective.

The case presenting perhaps the starkest contrast is *Bui v. DiPaola*, 170 F.3d 232, 239 (1st Cir. 1999), the First Circuit case that the district court cited. In *Bui*, the First Circuit observed that courts "routinely" conclude that defendants have impliedly waived their rights in cases in which the "incriminating statements were made either as part of a 'steady stream' of speech or as part of a back-and-forth conversation with the police." *Bui*, 170 F.3d at 240 (internal citations omitted). The First Circuit concluded that the petitioner's interview "fit the implied waiver profile" because the record showed "a fairly standard two-way conversation with the authorities" in which the petitioner's conduct even included a "continuation of the conversation," asking the officers "'who said I did this'" when the officers inquired "whether he had something to say about the reasons for his arrest" in response to the petitioner's "boast[] that the police had nothing" on him. *Id.* at 240-41. The account of Helgert's interview with Thompkins bears no resemblance to the clear evidence in *Bui* of a back-and-forth conversation between the petitioner and the authorities, which included specific questions and answers. Indeed, the evidence in *Bui* demonstrated that the petitioner even *asked* questions; in contrast, as Helgert testified at trial, Thompkins "spent a lot of his time sitting . . . simply holding his head looking down," J.A. at 364 (Trial Tr. 5/16/2002 at 109). Helgert described the interview as "nearly a monologue," J.A. at 227 (Supp. Hr'g Tr. at 92), and as "very, very one-sided," J.A. at 217 (Supp. Hr'g Tr. at 82), an account that clearly establishes the interview was *not* "a fairly standard two-way conversation." *Bui*, 170 F.3d at 241.

As a result, we conclude that Thompkins did not waive his rights, and the Michigan Court of Appeals unreasonably applied clearly established federal law, namely *Miranda* itself and *Butler*, in concluding otherwise. The state failed to satisfy its "heavy burden" of showing that Thompkins's "course of conduct indicat[ed] waiver." *Butler*, 441 U.S. at 373. Indeed, Thompkins's persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights. *See United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988) (concluding that the defendant "did not waive her rights" when, "[i]n the face of repeated questioning by Agent Brehm, Wallace maintained her silence for several minutes and, perhaps, as many as ten minutes.").

In sum, we hold that the district court erred in denying Thompkins's petition for a writ of habeas corpus because the Michigan Court of Appeals's rejection of his Fifth Amendment claim "was based on an unreasonable determination of the facts in light of the evidence" and "involved

an unreasonable application of[] clearly established Federal law." § 2254(d). Because we conclude that the Michigan Court of Appeals unreasonably applied clearly established federal law in determining that Thompkins *waived* his right to remain silent, we do not need to resolve whether the state court further unreasonably applied clearly established federal law in determining that Thompkins failed to *invoke* his right to remain silent by in fact remaining substantively silent for nearly three hours.

C. Thompkins's Prosecutorial Misconduct Claim

Thompkins argues that various instances of prosecutorial misconduct violated his Due Process Clause right to a fair trial. Pet'r Br. at 23-34. Thompkins's claim of prosecutorial misconduct centers upon the prosecution's offering "evidence of Purifoy's jury verdict and guilty plea conviction and of the aider and abettor charge against Purifoy." J.A. at 459 (Order Granting Certificate of Appealability at 3).

The warden argues that Thompkins has procedurally defaulted this claim because he failed to object contemporaneously to the instances of prosecutorial misconduct and the Michigan Court of Appeals reviewed this claim for plain error. Resp't Br. at 25 (citing *Gulertekin v Tinnelman-Cooper*, 340 F.3d 415, 423-34 (6th Cir. 2003); *see also Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000) (noting that "[c]ontrolling precedent in our circuit indicates that plain error review does not constitute a waiver of state procedural default rules"). The warden further notes that Thompkins's appellate brief failed to argue for the existence of cause and prejudice to excuse his procedural default. Resp't Br. at 25. In his Reply Brief, Thompkins did include a brief section asserting that his arguments relating to his ineffective-assistance-of-counsel claim sufficiently demonstrated cause and prejudice for the failure to preserve his claim of prosecutorial misconduct. Pet'r Reply Br. at 2-3.

In ruling on Thompkins's prosecutorial-misconduct claim, the district court noted the warden's argument that the claim was procedurally defaulted but elected to consider the merits "[g]iven that the cause and prejudice inquiry for the procedural default issue merges with an analysis of the merits of [Thompkins's] ineffective assistance of counsel claim." J.A. at 184 (Op. at 11 n.3). Although Thompkins's failure to set forth an explicit argument regarding cause and prejudice until his Reply Brief is troubling in light of this clear notice that the warden had already asserted that his prosecutorial-misconduct claim was procedurally defaulted, we follow the district court in considering the merits of Thompkins's prosecutorial-misconduct claim given the overlapping analysis. We also conclude that Thompkins is not entitled to relief on this claim.

1. Clearly Established Federal Law Regarding Prosecutorial Misconduct

"On habeas review, [t]he relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the conviction a denial of due process." *Bates v Bell*, 402 F.3d 635, 640-41 (6th Cir. 2005) (quotation omitted). Therefore, "to obtain relief, [Thompkins] must demonstrate that the prosecution's conduct was both improper and so flagrant as to warrant reversal." *Id* at 641. We consider four factors "in determining whether the challenged conduct is flagrant: (1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the defendant." *Id* Finally, "[c]laims of prosecutorial misconduct are reviewed deferentially on habeas review." *Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004).

2. The State Court's Adjudication of Thompkins's Prosecutorial-Misconduct Claim

The Michigan Court of Appeals applied plain-error review to Thompkins's claim of prosecutorial misconduct because of his failure to lodge contemporaneous objections. J.A. at 164-65

(Mich. Ct. App. Op. at 2-3). The state court recognized that it was "improper for the prosecution to introduce evidence of codefendant Purifoy's conviction," but it concluded that Thompkins's "substantial rights were not affected because the defense asserted that Purifoy was the shooter and that the evidence of Purifoy's conviction [on firearm charges] linked Purifoy to the gun." J.A. at 164 (Op. at 2). As a result, the court of appeals apparently believed that the evidence that Purifoy had been convicted of possessing a firearm on that date would bolster Thompkins's attempts to pin the murder on Purifoy, despite the evidence that Purifoy's jury had acquitted him of the murder charges.

The district court agreed with the state court that "[t]he testimony regarding the outcome of Purifoy's trial was improper and should not have been admitted." J.A. at 186 (Op. at 13). However, the district court noted that "if the defendant's accomplice testifies at trial, evidence of the accomplice's convictions may be introduced so the jury can assess his credibility," so long as the trial court instructs the jury "that it may not consider the accomplice's conviction as evidence of the defendant's guilt." J.A. at 186-87 (Op. at 13-14). Even though Purifoy testified and the trial court failed to give the jury such a cautionary instruction, the district court denied Thompkins's prosecutorial-misconduct claim because it did not believe that the introduction of such evidence rendered the entire trial fundamentally unfair. *Id.*

We agree with the district court's analysis and affirm the denial of Thompkins's prosecutorial-misconduct claim on this ground. The true cause for concern is not necessarily that the prosecutor elicited such evidence of an accomplice's conviction—as the district court noted, evidence of an accomplice's conviction *is* admissible to evaluate the witness's credibility—but rather the failure of the trial court to instruct the jury on the proper use of the evidence (and the failure of defense counsel to request such an instruction). It was not wholly illegitimate and improper for the prosecution to introduce evidence of Purifoy's convictions, and the error that occurred from this introduction stemmed not from the *prosecutor's* actions but instead from the failure of Thompkins's counsel to request, and the trial court's failure to give, a cautionary instruction to the jury. That is, although an error or misconduct occurred, the parties responsible for that error are Thompkins's attorney and the trial judge, not the prosecutor. Accordingly, Thompkins's claim of prosecutorial misconduct lacks merit.

D. Thompkins's Ineffective-Assistance-of-Counsel Claim

Thompkins argues that he received ineffective assistance of counsel because his attorney failed to request that the trial court instruct the jury that it could consider the evidence of Purifoy's jury trial and guilty pleas only in assessing Purifoy's credibility and not as substantive evidence of Thompkins's guilt. Pet'r Br. at 36. We conclude that the district court erred in denying Thompkins's ineffective-assistance-of-counsel claim and that Thompkins is entitled to habeas relief on this ground as well.

1. Clearly Established Federal Law Regarding Ineffective Assistance of Counsel

The standard for establishing ineffective assistance of counsel requires that a defendant (1) "show that counsel's representation fell below an objective standard of reasonableness" and (2) that a defendant show prejudice, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Further, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694

2. The State Court's Adjudication of Thompkins's Ineffective-Assistance-of-Counsel Claim

That Thompkins has satisfied the first prong of his ineffectiveness claim—deficient performance—is clear. Although the warden contends that "failure to ask for [a limiting] instruction was sound trial strategy," Resp't Br. at 30, the Michigan Court of Appeals appeared to accept that counsel's failure to request a limiting instruction was error and simply denied Thompkins ineffectiveness claim because it found a lack of prejudice because "the record does not disclose an attempt to argue [Purifoy's] conviction for an improper purpose," that is, for a purpose other than an effect on Purifoy's credibility. J.A. at 166 (Mich Ct. App. Op. at 4). Likewise, the district court agreed with Thompkins "that effective counsel would have requested such [a limiting] instruction." J.A. at 197 (Op. at 24). Indeed, the failure to request such a limiting instruction is particularly deficient in light of Thompkins's primary defense at trial, which was "that Eric Purifoy was the shooter and that defendant was merely present." Pet'r Br. at 7. The district court noted Thompkins's argument that "he was extraordinarily prejudiced by the introduction of this testimony [relating to Purifoy's trial and convictions] because his defense was that Purifoy was the shooter. As [Thompkins] raises: '[i]f Purifoy's jury found him not guilty who did that leave as the shooter?'" J.A. at 185 (Op. at 12).

We hold that Thompkins has satisfied the second prong of his ineffectiveness claim as well. Although the district court found that the performance of Thompkins's counsel was deficient, the court denied Thompkins's claim because "the Court [did] not believe that the introduction of evidence regarding Purifoy's convictions rendered [Thompkins's] trial fundamentally unfair." J.A. at 197 (Op. at 24). Rendering the trial "fundamentally unfair," however, is not the standard used to evaluate a claim of ineffective assistance; under *Strickland*, the required showing is prejudice, measured as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Given that Thompkins's *central strategy* at trial involved pinning the blame on Purifoy, that his jury heard evidence—from *multiple* witnesses, J.A. at 345-47 (Trial Tr. 5/16/2002 at 85-87) (Helgert); J.A. at 289 (Trial Tr. 5/13/2002 at 237) (France); J.A. at 401 (Trial Tr. 5/16/2002 at 188) (Purifoy)—that Purifoy had been acquitted of murder likely exerted a powerful influence on the jury to convict Thompkins of murder. If the jury did not convict Thompkins, the jury knew that no one would be convicted for killing Morris and shooting France. Most importantly, in the absence of a limiting instruction, the jury could well have believed that it was entirely proper to weigh Purifoy's acquittal as significant evidence that Thompkins must have been the shooter. In fact, the trial court's jury instructions included the statement that "[y]ou may convict the defendant *based only on the accomplice's testimony*, if you believe the testimony and it proves the Defendant's guilty beyond a reasonable doubt." J.A. at 443 (Trial Tr. 5/17/2002 at 166) (emphasis added). The jury thus heard that it could convict Thompkins based solely on Purifoy's testimony, which included not only his account of the shooting but also his statement that he had been acquitted of murder.

Although we have concluded that the district court erred in denying Thompkins's ineffective-assistance-of-counsel claim, on habeas review Thompkins of course bears the additional burden of "show[ing] that the [Michigan] Court of Appeals applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v Cone*, 535 U.S. 685, 699 (2002). We hold that Thompkins has satisfied this burden as well.

The Michigan Court of Appeals applied *Strickland* in an objectively unreasonable manner in this case because its analysis of prejudice was fundamentally flawed. The Michigan Court of Appeals appeared to acknowledge that Thompkins's counsel erred and was deficient in failing to request a limiting jury instruction regarding the evidence of Purifoy's trial verdicts, but it rejected Thompkins's claim because "the record does not disclose an attempt to argue [regarding Purifoy's]

conviction for an improper purpose." J.A. at 166 (Mich. Ct. App. Op. at 4). Questions of the prosecution's purpose or intent are completely irrelevant in an analyzing whether an error resulted in prejudice, which by definition concerns the error's effect upon the *outcome*. *Strickland*, 466 U.S. at 696 ("[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the *decision reached* would reasonably likely have been different absent the errors.") (emphasis added). Even if the prosecution intended that the evidence regarding Purifoy's jury trial outcome be considered only as it pertained to Purifoy's credibility, the prosecutor's intent does not cure the problem that a reasonable probability exists that the jury understood Purifoy's acquittal as powerful evidence that Thompkins, the only other individual in the front seat of the van, must have been the shooter.

In denying Thompkins's ineffective-assistance claim on the ground that the prosecution did not introduce evidence relating to Purifoy's jury trial "for an improper purpose," the Michigan Court of Appeals applied the prejudice prong of the *Strickland* analysis in an objectively unreasonable manner. We therefore conclude that Thompkins is entitled to relief on his claim of ineffective assistance of counsel.

III. CONCLUSION

For the reasons discussed above, we **AFFIRM** the district court's denial of Thompkins's petition for a writ of habeas corpus as to his claim of prosecutorial misconduct, but we **REVERSE** the judgment of the district court denying relief as to his Fifth Amendment and ineffective-assistance-of-counsel claims and **REMAND** the case with instructions that the district court order that Thompkins be released from state custody unless the State of Michigan commences a new trial within 180 days of the final federal-court judgment in this case.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 19, 2008
LEONARD GREEN, Clerk

No. 06-2435

VAN CHESTER THOMPKINS, JR ,
Petitioner - Appellant,

v.

MARY BERGHUIS, Warden,
Respondent- Appellee.

Before: MOORE, CLAY, and ROGERS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART and REVERSED IN PART. IT IS FURTHER ORDERED that the case is REMANDED with instructions that the district court order that petitioner Van Chester Thompkins be released from state custody unless the State of Michigan commences a new trial within 180 days of the final federal-court judgment in this case.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

No. 06-2435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 24, 2009
LEONARD GREEN, Clerk

VAN CHESTER THOMPKINS, JR.,

Petitioner-Appellant,

v.

MARY BERGHUIS, WARDEN,

Respondent-Appellee

ORDER

BEFORE: MOORE, CLAY, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and [illegible]ion of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VAN CHESTER THOMPKINS, Jr.

Petitioner,

v.

CASE NO. 05-CV-70188-DT
Honorable Patrick J. Duggan

MARY BERGHUIS,

Respondent.
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan on September 28, 2006.

Present: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

Petitioner Van Chester Thompkins, Jr., ("Petitioner"), presently confined at the Brooks Correctional Facility in Muskegon Heights, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his application, filed by his attorney, Petitioner challenges his conviction on one count of first-degree murder, MICH. COMP. LAWS ANN. § 750.316; one count of assault with intent to commit murder, MICH. COMP. LAWS ANN. § 750.83; three counts of possession of a firearm in the commission of a felony, MICH. COMP. LAWS ANN. § 750.227b; one count of felon in possession of a firearm, MICH. COMP. LAWS ANN. § 750.224f; and one count of carrying a concealed

weapon in a motor vehicle, MICH. COMP. LAWS ANN. § 750.227. For the reasons stated below, the petition for writ of habeas corpus is DENIED.

On May 20, 2002, Petitioner was convicted of fatally shooting Samuel Morris and wounding Frederick France on January 10, 2000, in Southfield, Michigan. The trial court sentenced Petitioner on June 4, 2002. His conviction and sentence were affirmed on appeal. *People v. Thompkins*, No. 242478 (Mich. Ct. App. Feb. 3, 2004). The Michigan Supreme Court denied Petitioner's request for leave to appeal. *People v. Thompkins*, No. 125667 (Mich. July 29, 2004). Petitioner filed the pending writ of habeas corpus on January 19, 2005.

Petitioner raises the following claims in support of his request for habeas corpus relief:

> I. Prosecutorial misconduct denied Petitioner due process of law in the following ways:
>
> a. The prosecutor offered evidence of Petitioner's co-defendant's jury verdict and guilty plea conviction, offered evidence of an uncharged acquaintance's unrelated bad acts, and offered opinion evidence on the guilt of the Petitioner.
>
> b. The prosecutor elicited evidence of Petitioner's exercise of his right to remain silent and of his right to counsel and he denigrated counsel.
>
> c. The prosecutor's questioning of Tomika Stephens and of Detective Helgert concerning Petitioner's one-year absence from the jurisdiction was improper where its effect both explicitly and implicitly was to offer evidence that Petitioner had committed crimes other than

the ones for which he was on trial.

d. The prosecution offered unfairly prejudicial information by circumventing the rules of evidence in pretending to use the Purifoy letters for impeachment.

e. The prosecution argued facts not in evidence.

f. The prosecutor asked the jury to sympathize with the mother of the deceased.

g. The prosecution shifted the burden of proof to the defense in the rebuttal argument.

II. Petitioner was denied the effective assistance of counsel where trial counsel failed to object to prosecutorial misconduct which included a trial-long effort to convict Petitioner based on guilt by association. The trial court clearly err when it denied appellant's request for an evidentiary hearing on this issue.

III. Where petitioner remained mute for three hours after being informed of his Miranda rights and where he refused to sign the rights form, he was unequivocally exercising his Fifth Amendment privilege against self-incrimination. The answers given at the very end of that time period were elicited in violation of the Due Process Clause and also in violation of Miranda v. Arizona

IV. The trial court erred in denying the motion to suppress Frederick France's in-court and out-of-court identification of Petitioner as the shooter.

Respondent filed an answer to the Petition on July 26, 2005.

Factual Background

At Petitioner's trial, Frederick France, one of the victims of the shooting on January 10, 2000, testified that he was driving in Southfield, Michigan, at around 9:00 p.m., with Samuel Morris, the decedent. Morris drove into the parking lot of a strip mall. Three to four males exited Lou's Deli, a restaurant located in the strip mall, and crossed to the parking lot in front of France's and Morris' car. Morris stopped to let the men pass. One of the men, later identified as Petitioner, was staring at Morris and France. Petitioner continued to stare at Morris and France as he walked backwards toward a van, which was white and blue with gold rims. France and Morris exited their vehicle and France yelled at Petitioner: "What you all looking at?" Petitioner or one of the other men with him yelled back: "What the f-ck you're looking at." Morris and France then returned to their car and began to drive away.

France then noticed the blue and white van approaching them. When Morris stopped his car, the van drove past. The driver of the van then backed up so the passenger's side window of the van was even with the driver's side window of Morris' car. The vehicles were approximately four feet apart. The passenger side window of the van was open. France identified Petitioner as the front seat passenger of the van and Eric Purifoy as the driver of the van.

At that point, Petitioner said to France and Morris, "What you say, big dog?" Petitioner then pulled out a gun and began firing into the driver's side window of Morris' car. France ran from the car, but was hit by several bullets as he tried to escape. France

testified that he had no doubt that Petitioner was the passenger of the van and the individual who fired the shots.

Omar Stephens, who testified that he was Petitioner's friend, told the jury that about a month after the shooting, Petitioner told him that "he had to pop them niggers up." Stephens knew that Petitioner drove a van and carried a black and gold .45 caliber gun. Detective Christopher Helgert of the Southfield Police testified that shell casings found at the crime scene were from a .45 caliber gun. According to Stephens, Petitioner told him that he had to get rid of the van, but that before he did, he removed and sold the van's rims and stereo. When the police recovered the van, it was missing the gold rims and stereo. Stephens admitted that he had been convicted of armed robbery in 1999. Stephens also admitted that he only informed the police about Petitioner's statements to him after the Detroit Police arrested him in a drug case.

Petitioner eventually was arrested on February 19, 2001, in Ohio. Ben Damschroder, a police officer in Ohio, testified that he and other officers were dispatched to a car dealership in Meflen Township, Ohio, to arrest a homicide suspect. Prior to arriving at the dealership, Damschroder received a description of the vehicle Petitioner would be driving. Eventually, Damschroder observed the vehicle leave the dealership lot, followed by another vehicle. Damschroder followed the vehicles as they entered a parking lot about two hundred feet away from the dealership. Two individuals then exited each vehicle. As Damschroder did not have a description of Petitioner at that time, he ordered all four individuals to the ground. Petitioner fled the area on foot, but

subsequently was seized.

James Parrish, a police officer from Clinton Township, Ohio, assisted in Petitioner's arrest. Parrish recovered three types of identification from Petitioner, all of which contained names other than Van Chester Thompkins. Petitioner told the police that his name was Detniuan Ishia Reed. Officers from the Federal Bureau of Investigation who arrived on the scene did not believe that Petitioner was the homicide suspect because he did not look exactly like the picture on the suspect's "Wanted" poster and therefore they decided not to take him into custody. Parrish, however, believed that Petitioner was the wanted suspect, particularly as Petitioner responded to Parrish when he called him "Van." Parrish therefore arrested Petitioner for obstruction based on his failure to obey Damschroder's commands to stop.

On the third day of Petitioner's trial, Eric Purifoy also testified. Prior to his testimony, the prosecutor moved to exclude several letters that Purifoy allegedly wrote to Petitioner based on the fact that defense counsel only produced them the preceding day. In response to the prosecutor's motion, defense counsel claimed that he had not decided whether to introduce the letter and that he only received the letters himself the night before Petitioner's trial began. The letters subsequently were introduced into evidence without objection, with a statement read to the jury concerning their production.[1]

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[1]The prosecutor's motion was resolved off-the-record and it is not clear who prepared the statement read to the jury; although as Petitioner refers to the statement as a "stipulation," the Court assumes that it at least was agreed to by both parties.

During his testimony, Purifoy described himself as an acquaintance of Petitioner and a friend of Myzell Woodward. Purifoy testified that on the day of the shooting, he, Woodward, and Petitioner went to Lou's Deli in Petitioner's van. After the three men finished eating, they walked outside.

According to Purifoy, he, Woodward, and Petitioner crossed in front of a red car as they walked toward Petitioner's van. The three men then got into the van; Purifoy drove, Petitioner sat in the front passenger seat, and Woodward sat in a rear seat. As they drove toward the exit of the parking lot, Purifoy noticed the passenger of the red car standing outside the car making gestures. Purifoy drove the van past the red car but then Petitioner told him to stop because "they had said something." Purifoy then backed up the van to where the red car was stopped. Purifoy heard someone say something and then heard gunshots. Purifoy ducked down into his seat and claimed that Petitioner did the same. Purifoy testified that he heard Petitioner say "what's up" and that when Purifoy sat back up in his seat, he saw Petitioner with a small, black, semi-automatic weapon. According to Purifoy, Petitioner then asked Purifoy "what the hell you doing" and ordered him to "pull off." Purifoy was unaware that anyone had been shot.

Purifoy was charged with first-degree murder, assault with intent to murder, and several weapons offenses arising from the January 10 shooting. At a separate jury trial, prior to Petitioner's trial, Purifoy was acquitted of the murder and assault charges but convicted of several weapons offenses. He subsequently pleaded guilty to additional weapons offenses arising from the incident. Purifoy was not given immunity for his

testimony in Petitioner's case.

Southfield Police Detective Christopher Helgert testified regarding his and his partner's interrogation of Petitioner following his arrest in Ohio. According to Helgert, Petitioner first was read his *Miranda* warnings. Petitioner neither requested an attorney nor indicated that he did not want to talk to the officers. The officers spoke to Petitioner for approximately two hours and forty-five minutes. Helgert and his partner did most of the talking; Petitioner occasionally responded only saying "yeah," "no," or "I don't know." Helgert testified that towards the end of the interview, he asked Petitioner if he prayed to God. Helgert testified that Petitioner said "yes" and that his demeanor changed at this point in that he looked directly at Helgert with moistened eyes. Helgert then asked Petitioner: "Do you pray to God to forgive you for shooting that boy down?" Helgert testified that Petitioner answered "yes" and then looked down. The interview ended shortly thereafter. During his testimony, in response to a question by Petitioner's counsel, Helgert stated: "I am absolutely convinced and am now that your client was there."

Helgert also testified that, prior to interviewing Stephens, the police had not disseminated to the public any information concerning the type of weapon used in the January 10 shooting. Helgert acknowledged that Stephens gave his statement to the police only after he had been arrested and detained on a drug charge in Detroit. Helgert denied making any promises to Stephens in exchange for his testimony.

Standard of Review

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In short, a federal court is bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. *Franklin v. Francis*, 144 F.3d 429 (6th Cir. 1998). The federal court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1)[2]; *see also Cremeans v. Chapleau*, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

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[2] 28 U.S.C. § 2254(e)(1) provides, in pertinent part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .
>
> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 1519-20 (2000).

With respect to the "unreasonable application" clause of Section 2254(d)(1), the United States Supreme Court has instructed that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of [the Supreme] Court to the facts of a prisoner's case." *Id.* at 409, 120 S. Ct. at 1521. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 410-11, 120 S. Ct. at 1521-22.

Discussion

Petitioner's Prosecutorial Misconduct Claims

Petitioner alleges that he was deprived of a fair trial because of prosecutorial misconduct.[3] When a petitioner seeking habeas relief makes a claim of prosecutorial misconduct, the reviewing court must consider that "the touchstone of due process . . . is the fairness of the trial, not the culpability of the prosecutor." *Serra v. Michigan Dep't of Corr.*, 4 F.3d 1348, 1355-56 (6th Cir. 1993) (quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 947 (1982)). On habeas review, a court's role "is to determine whether the [prosecutor's] conduct was 'so egregious so as to render the entire trial fundamentally unfair.'" *Id.* (quoting *Cook v. BordenKircher*, 602 F.2d 117, 119 (6th Cir. 1979). When analyzing a claim of prosecutorial misconduct, a court initially must decide whether the challenged statements were improper. *Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000). If the conduct is improper, the district court then must examine whether the statements or remarks are so flagrant as to constitute a denial of due process and warrant granting a writ. *Id.* In evaluating prosecutorial misconduct in a habeas case,

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[3]Respondent contends that Petitioner's prosecutorial misconduct claims are procedurally defaulted because he failed to object to the alleged prosecutorial misconduct at trial and the Michigan Court of Appeals relied on his failure to object as a basis to reject the claims. In the second issue raised in his petition, Petitioner claims that his trial counsel was ineffective for failing to object to the prosecutorial misconduct. Ineffective assistance of counsel may establish cause for procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 451-52, 120 S. Ct. 1587, 1591 (2000). Given that the cause and prejudice inquiry for the procedural default issue merges with an analysis of the merits of Petitioner's ineffective assistance of counsel claim, the Court finds it easier to simply consider the merits of his prosecutorial misconduct claim. *See Cameron v. Birkett*, 348 F. Supp. 2d 825, 836 (E.D. Mich. 2004).

consideration should be given to the following: (a) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (b) whether the remarks were isolated or extensive; (c) whether the remarks were deliberately or accidentally placed before the jury; and, (d) the strength of the competent proof to establish the guilt of the accused. *Serra*, 4 F.3d at 1355-56 (citation omitted).

Petitioner first contends that the prosecutor improperly and on several occasions elicited evidence of the jury verdict in Purifoy's case. Petitioner contends that he was extraordinarily prejudiced by the introduction of this testimony because his defense was that Purifoy was the shooter. As Petitioner raises: "[i]f Purifoy's jury found him not guilty who did that leave as the shooter?" In other words, Petitioner suggests that evidence of the jury's verdict in Purifoy's case diluted the presumption of Petitioner's innocence. Petitioner argues that there was no legitimate basis for offering this evidence.

Second, Petitioner contends that he was prejudiced by testimony indicating that Purifoy had been charged as an aider and abettor in the January 10 shooting. Petitioner explains that such information bolstered Purifoy's testimony that Petitioner, not Purifoy, was the shooter. Petitioner complains that this point was bolstered by Helgert's testimony that the prosecutor's warrant for Purifoy was issued on an aiding and abetting theory. Applying the plain error rule, the Michigan Court of Appeals rejected these allegations of prosecutorial misconduct, explaining:

> To the extent it was improper for the prosecutor to introduce evidence of codefendant Purifoy's criminal conviction, *see People v. Lytal*, 415 Mich. 603, 612; 329 N.W.2d 738 (1982),

> defendant's substantial rights were not affected because the defense asserted that Purifoy was the shooter and that the evidence of Purifoy's conviction linked Purifoy to the gun.

People v. Thompkins, No. 242478, at 2 (Mich. Ct. App. Feb. 3, 2004)(unpublished opinion).

The testimony regarding the outcome of Purifoy's trial was improper and should not have been admitted. The jury in Petitioner's case learned not only that Purifoy was found guilty of possessing a gun, but also that Purifoy was acquitted of the first degree murder and assault charges. Thus while evidence of Purifoy's conviction on the gun charges linked him to the gun, as the state court noted, the jury's acquittal of Purifoy with respect to the murder and assault charges further suggested that he nevertheless was not the shooter. In other words, having learned that Purifoy was convicted on the weapons charges but acquitted on the murder and assault charges, the jury in Petitioner's case may have assumed that it was settled that there was a gun(s) in the van with Petitioner, Purifoy, and Woodward, and that someone in the van– but not Purifoy– pulled the trigger.

With respect to Purifoy's convictions, such evidence "is generally inadmissible, because it might lead the jury to 'regard the issue of the remaining defendant's guilt as settled and [conclude that] the trial is a mere formality.'" *United States v. Modena*, 302 F.3d 626, 631 (6th Cir. 2002) (quoting *United States v. Griffin*, 778 F.2d 707, 711 (11th Cir. 1985)). However, if the defendant's accomplice testifies at trial, evidence of the accomplice's convictions may be introduced so the jury can assess his credibility. *Id.* The trial court, however, must instruct the jury that it may not consider the accomplice's

conviction as evidence of the defendant's guilt. *Id.* Purifoy testified at Petitioner's trial, but the trial court failed to give the jury this cautionary instruction. Nevertheless, this Court believes the introduction of evidence regarding the outcome of Purifoy's trial did not "render the entire trial fundamentally unfair" in light of the overwhelming evidence identifying Petitioner, rather than Purifoy, as the shooter. *United States v. Wiedyk*, 71 F. 3d 602, 607-08 (6th Cir. 1995).

Petitioner next claims that the prosecutor improperly elicited testimony from Purifoy that Woodward – one of the individuals in the van at the time of the shooting– subsequently was charged with murder in Ohio and faced the death penalty. Petitioner argues that this testimony was not relevant and lacked any probative value. On the other hand, Petitioner contends that the testimony suggested to the jury that he associates with unsavory characters and therefore must be guilty of the crimes charged. Petitioner argues that he was further prejudiced by this testimony when the prosecutor repeatedly asked his girlfriend, Tomika Stephens, why Petitioner was in Ohio. Petitioner believes that this inquiry suggested to the jury that he somehow was involved in Woodward's crime.

The Michigan Court of Appeals rejected Petitioner's claims concerning the above testimony, stating: ". . . the evidence did not show that codefendant Woodward was convicted in this matter." By focusing on a conviction related to the incident on January 10– rather than Woodward's murder charge in Ohio– the state court apparently misunderstood Petitioner's argument. Nevertheless, this Court finds that the evidence was admissible as it was relevant to establish that Purifoy had a motive for lying and the

probative value of the evidence did not unduly prejudice Petitioner so as to deprive him of a fair trial. As Respondent explains, the prosecutor asked Purifoy about Woodward's murder charge and the potential sentence Woodward faced on that charge in order to impeach Purifoy's claim that Woodward was the shooter. The government wanted to show that Purifoy was blaming Woodward because he knew that Woodward would have nothing to lose if he were held responsible for the January 10 shooting.

Petitioner further contends that the prosecutor improperly elicited Helgert's opinion that he is "absolutely convinced and was then that [Petitioner] was there [at the shooting]" and improperly bolstered the officer's credibility by obtaining his statement that "[his] ultimate role as an investigator is to seek the truth." Helgert's statements, however, were not elicited by the prosecutor but instead were responses to defense counsel's cross-examination.

Petitioner also claims that the prosecutor improperly elicited evidence that Petitioner exercised his right to remain silent when he was interviewed by the police following his arrest. Because this claim is interrelated with Petitioner's third claim, *infra*, the Court will address this prosecutorial misconduct claim when addressing that claim.

Petitioner next contends that the prosecutor denigrated defense counsel in his closing arguments. It is improper for an attorney to make "unfounded and inflammatory attacks" on opposing counsel. *United States v. Young*, 470 U.S. 1, 9, 105 S. Ct. 1038, 1043 (1985). Nevertheless, ". . . a prosecutor's statements [about opposing counsel] must be viewed in context." *United States v. Catlett*, 97 F.3d 565, 572 (D.C. Cir. 1996). When

viewed in context, the Court does not view the prosecutor's statements in Petitioner's case as attacks on the credibility or motive of defense counsel. For example, the Court does not read the prosecutor's statement concerning the surveillance tape at Lou's Deli as suggesting that defense counsel would have concocted a different story if there were no such tapes and thus no indisputable evidence establishing Petitioner's presence at the deli before the shooting. Instead, the Court reads the prosecutor's comment as suggesting that *Petitioner* would have denied being at the scene but for the videotape establishing otherwise. To the extent any statements did denigrate defense counsel, however, the Court finds the comments harmless.

Petitioner claims that the prosecutor improperly questioned witnesses about Petitioner's one year absence from Michigan and his activities during that period, thereby suggesting that Petitioner was involved in other unspecified crimes in different states during that time. Petitioner further contends that testimony regarding efforts to find him after the shooting that referred to searches through the records of different police departments suggested to the jury that he may have been convicted of or charged with crimes in those jurisdictions.

Under Michigan and Federal law, flight is relevant to consciousness of guilt. *Brown v. Palmer*, 441 F.3d 347, 352 (6th Cir. 2006); *Johnson v. Burke*, 903 F.2d 1056, 1062 (6th Cir. 1990) (citing *People v. Mindeman*, 157 Mich. 120, 121-22, 121 N.W. 488, 489-90 (1909) and *People v. Stull*, 127 Mich. App. 14, 17, 338 N.W.2d 403, 406 (1983)). Because evidence concerning Petitioner's flight to Ohio and possibly to several other

states was admissible to show his consciousness of guilt, the prosecutor did not engage in prosecutorial misconduct by admitting such evidence. Helgert's brief remark that the Michigan officers looked at documents from other police departments that contained information about Petitioner did not inform the jury that Petitioner had prior convictions in other states and it would be purely speculative to conclude that the jury made such an assumption based on this testimony. In any event, the Court finds Helgert's limited testimony on this issue harmless in light of the overwhelming evidence of Petitioner's guilt in this case.

Petitioner next contends that the prosecutor offered unfair prejudicial information when it introduced into evidence the letters Purifoy wrote to Petitioner. According to Petitioner, he was prejudiced by the admission of the letters because they allowed the prosecution to introduce the fact that he was incarcerated while awaiting trial, informed the jury that Woodward possibly was facing the death penalty in Ohio, and suggested that Petitioner and Purifoy concocted Petitioner's defense. As an initial matter, the Court notes that it was the defense that first proposed introducing Purifoy's letters. In any event, the admission of the letters did not violate Petitioner's rights.

The Court already has addressed the evidence regarding Woodward's charges in Ohio. As to Petitioner's incarceration while awaiting trial, as there was no suggestion that Petitioner was incarcerated for a prior conviction, any fleeting reference to that fact did not render his trial fundamentally unfair. *See e.g. Tolbert v. LeCureaux*, 811 F. Supp. 1237, 1244 (E.D. Mich. 1993). With regard to Petitioner's assertion that the letters were

inadmissible because they suggested that he and Purifoy concocted or "cooked up" his defense, Purifoy's statements in his letters provided the prosecutor with a good faith basis to believe that Purifoy and Petitioner were discussing possible defenses in their correspondences. Clearly this evidence was admissible to impeach Purifoy's credibility. "'[I]t is certainly within the bounds of fair advocacy for a prosecutor, like any lawyer, to ask the jury to draw inferences from evidence that the prosecutor believes in good faith might be true.'" *Shaw v. Terhune*, 380 F.3d 473, 480 (9th Cir. 2004) (quoting *United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002)). Thus the admission of the letters did not violate Petitioner's rights. *See e g. United States v. Smith*, 982 F. 2d 681, 683 (1st Cir. 1993) (prosecutor's statement that the witness and the defendant had "concocted" their story was proper because it suggested inferences that the jury could draw from the conflicting evidence).

Petitioner next contends that the prosecutor argued facts not introduced into evidence when he argued that Purifoy and France, *before knowing what the other would say*, identified Petitioner as the passenger of the vehicle and Purifoy as the driver. Petitioner contends that this was misleading because Purifoy in fact previously heard France's testimony at Purifoy's preliminary examination and trial. Well before that time, however, when first contacted by the police, Purifoy admitted that he "might have been there" but was not the shooter. When interviewed by the police the day after the shooting, France identified Purifoy as the driver and Petitioner as the shooter. Thus the prosecutor's argument was supported by facts in evidence. In any event, the trial judge

instructed the jury that the arguments of counsel were not evidence.

Petitioner next claims that the prosecutor attempted to garner sympathy for the victim and the victim's mother. The Michigan Court of Appeals agreed that the prosecutor made an improper appeal to sympathy in his opening statement, but found that the misconduct did not deprive Petitioner of a fair trial. This Court agrees, as the remark was brief and isolated and the trial court subsequently instructed the jury that it could not let sympathy influence its decision. *See Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir. 2000).

Finally, Petitioner contends that the prosecutor shifted the burden of proof in his rebuttal argument. Having reviewed the prosecutor's argument, the Court does not believe this to be true. Nevertheless, any possible prejudice resulting from the prosecutor's comments was cured by the trial court's instructions regarding the proper burden of proof. *See Scott v. Elo*, 302 F.3d 598, 603-04 (6th Cir. 2002).

In short, Petitioner fails to show that he was deprived of a fair trial because of prosecutorial misconduct. The Court therefore concludes that he is not entitled to habeas relief based on his first claim.

Ineffective Assistance of Counsel

Petitioner claims that he was deprived the effective assistance of counsel. The federal courts apply a two-part test to evaluate ineffective assistance of counsel claims:

> First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. This requires

> showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 666, 687, 104 S. Ct. 2052, 2064 (1984). In assessing counsel's performance, courts must consider "whether 'counsel's representation fell below an objective standard of reasonableness,' as measured by 'prevailing professional norms.'" *Rickman v. Bell*, 131 F.3d 1150, 1154 (6th Cir. 1997) (quoting *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064-65). There is a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. "To establish prejudice, a defendant must demonstrate a reasonable probability that 'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Rickman*, 131 F.3d at 1155 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068).

Petitioner first contends that his counsel was ineffective in that he failed to object to the prosecutorial misconduct described in his first claim. Because this Court has concluded that the claimed misconduct did not prejudice Petitioner, Petitioner's claim that counsel rendered ineffective assistance of counsel by failing to object to the prosecutor's conduct and remarks also must be rejected.

Petitioner next contends that his trial counsel improperly entered into two stipulations that were read to the jury. The first stipulation blamed Petitioner for failing to produce Purifoy's letters prior to trial, in violation of the trial court's discovery order. The second stipulation related to Petitioner's prior felony conviction as relevant to his

felon in possession charge.

As referred to earlier, Purifoy wrote Petitioner several letters while the two were incarcerated. Petitioner and Respondent acknowledge that the letters strongly suggest that Purifoy was a complete liar. In the prosecution's request for discovery, filed July 3, 2001, the prosecution requested *inter alia* "any written or recorded statements by lay witnesses" and "any document, photograph or other paper that the defendant intends to introduce at trial." These requests were submitted by the prosecutor in accordance with the mandatory disclosures required under Michigan Court Rule 6.201(A). Purifoy was listed on the Information as a witness the prosecution intended to call; however, defense counsel did not produce Purifoy's letters until the second day of trial– before Purifoy actually testified but after the prosecutor told the jury during his opening statement that Purifoy would be testifying and what the contents of his testimony would be. The prosecutor therefore moved to exclude the letters from evidence, arguing that defense counsel's failure to provide them earlier was a violation of "the discovery order" and that introduction of the letters was unfairly prejudicial. As the prosecutor argued to the court, if he had received the letters before the trial, he may have decided to not call Purifoy as a witness.

Although the prosecutor's motion was not resolved on the record, the letters eventually were utilized with the following statement read to the jury following Purifoy's testimony:

> Ladies and Gentlemen of the Jury, the letters that you have

> heard were written by Eric Purifoy and have been in custody of the – have been in the custody of the Defendant way back to May of two thousand and one (2001).
>
> The Defendant was required to turn the letters over to the Prosecution in July of two thousand and one (2001), but failed to do so.
>
> The letters were not turned over to the Prosecution until after the trial began. The Court finds this was an intentional violation on the part of the Defendant.

The trial court did not inform the jurors that the parties had stipulated to the statement, but simply read the statement after Purifoy left the stand. The prosecutor reminded the jurors of Petitioner's discovery violation during his closing argument.

Petitioner argues that his counsel did not have to agree to the above statement; but even so, that he should not have agreed to the statement as written. Petitioner further argues that, "[b]y entering into this stipulation, defense counsel [showed] to the jury that he did not believe in his client's innocence." As the Michigan Court of Appeals correctly concluded, however, defense counsel's decision to use the Purifoy letters– and therefore willingness to agree to the stipulation in order to avoid their exclusion[4]– should not be second-guessed. The letters clearly were harmful to the prosecution's case as they

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[4]Petitioner argues that the Michigan Court Rules did not require him to produce the letters because Rule 6.201 only mandates discovery of "written or recorded statement[s] by a lay witness whom the party intends to call at trial" and Petitioner never intended to call Purifoy. Rule 6.201, however, further mandates discovery of "any document . . . or other paper that the party intends to introduce at trial." MCR 6.201(A)(5). Purifoy was listed as a prosecution witness and defense counsel intended to use the letters to impeach him during cross-examination.

undermined Purifoy's credibility. Additionally, in light of the language of the statement and the fact that the trial court did not tell the jury that the prosecutor and the defendant had stipulated to the statement, the Court does not believe that it informed or suggested to the jurors that defense counsel agreed to its language. Therefore this Court finds no reason why the stipulation would suggest to them that defense counsel did not believe in his client's innocence.

The second stipulation concerns the proof of Petitioner's prior felony conviction to support the felon in possession charge. The trial court read the stipulation to the jury as follows:

> This is a stipulation between the Plaintiff, the People, and the Defense:
>
> "On January 10, 2000 the defendant was convicted of a felony and less than five years had passed since all imprisonment and/or all the terms of probation have been served."

It is not clear from the record whether the trial court inaccurately read the stipulation or whether the stipulation itself was incorrectly written. Nevertheless, Petitioner does not dispute that he had a prior felony conviction as he indicates that the stipulation should have read: "On January 1998" or "As of January 10, 2000, the defendant had been convicted of a felony." *See* Br. in Support of Petition at 33. Petitioner, however, argues that he was prejudiced by the stipulation because "the jury could infer that [he] had been convicted of the prior felony earlier on the day on which he committed the murder" and therefore "allowed them to speculate that [he] was unrepentant and incorrigible." *See id.*

The Court finds it purely speculative that the jury assumed from this instruction that Petitioner was convicted of a felony on the date of the shooting, as Petitioner argues. The Court finds it more probable that the jury had no idea what fact the stipulation was meant to convey. In any event, to establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, a habeas petitioner must make more than merely speculative assertions. *Bowen v. Foltz*, 763 F.2d 191, 194 (6th Cir. 1985). The Court finds no reason to believe that this poorly worded stipulation prejudiced Petitioner.

Petitioner next contends that counsel was ineffective for failing to request a cautionary instruction that evidence regarding Purifoy's conviction only was relevant as to the issue of Purifoy's credibility, and not as to Petitioner's guilt. While the Court agrees that effective counsel would have requested such an instruction, the Court does not believe that the introduction of evidence regarding Purifoy's convictions rendered Petitioner's trial fundamentally unfair.

Petitioner also claims that his counsel failed to effectively undermine Stephens' credibility. Specifically, Petitioner contends that his counsel should have requested an instruction that a prior conviction for a crime involving theft or dishonesty– in Stephens' case, armed robbery– can be used to decide whether to believe the witness. Petitioner also believes that his attorney should have attacked Stephens' credibility during his closing argument. During his cross-examination of Stephens, however, defense counsel impeached Stephens' credibility on a number of different issues. The fact of Stephens'

armed robbery conviction also was elicited during his testimony. Thus the Court cannot find that the outcome of Petitioner's trial would have been different if defense counsel had done more

Similarly, Petitioner is not able to demonstrate a reasonable probability that the result of the proceeding would have been different if his trial counsel had requested a limiting instruction that his prior felony conviction only could be considered with respect to his felon in possession charge. The specific nature of Petitioner's prior felony was not even raised during the trial. Additionally, the trial court specifically instructed the jury that it was to weigh the evidence as to each separate charge.

Petitioner next contends that counsel was ineffective for stating, during his cross-examination of Parrish, that counsel did not dispute the obstruction charge brought against Petitioner in Ohio. Petitioner explains that it is unreasonable trial strategy for an attorney to bring out his client's arrests without convictions. This evidence, however, was not brought out by defense counsel initially. During the prosecutor's direct examination of Parrish, Parrish explained that he arrested Petitioner for obstruction when the FBI declined to arrest him as the murder suspect. Defense counsel, during cross-examination, simply responded "not disputed" when Parrish again began explaining why he arrested Petitioner. Under these circumstances, where counsel in fact may have made the statement in order to avoid a further discussion of Petitioner's other bad act, the Court cannot find that counsel's performance was deficient.

Petitioner next contends that counsel was ineffective for not moving to excise

portions of Purifoy's letters, which Petitioner claims contained prejudicial and inflammatory references. The Court does not believe that the statements in the letters to which Petitioner refers were unduly inflammatory or prejudicial. Nevertheless, as defense counsel introduced the letters in an attempt to shift the blame to Purifoy– the author of the letters– the Court cannot question his decision to offer their entire contents.

Petitioner claims that counsel was ineffective for failing to investigate Stephens' motive for testifying. According to Petitioner, Stephens expected a plea bargain in a pending Wayne County drug case in exchange for his testimony at Petitioner's trial. Helgert, however, testified that he never made any promises to Stephens in exchange for his testimony. In fact, approximately six months before Petitioner even was apprehended in Ohio– and therefore before there ever was a prospect of Petitioner's case going to trial– Stephens' drug charges were resolved pursuant to a guilty plea and he was sentenced to probation under the supervision of the drug court. In any event, defense counsel thoroughly challenged Stephens' credibility, including eliciting information from which a jury could question Stephens' true motive for informing the police about Petitioner's admission.

Petitioner lastly contends that trial counsel was ineffective in that he failed to challenge, on Sixth Amendment grounds, Petitioner's statement to the police after he was apprehended in Ohio. According to Petitioner, his Sixth Amendment right to counsel had attached before he was interviewed by officers in Ohio. Petitioner basis his argument on his belief that a defendant cannot waive his right to an extradition hearing without first

receiving the advice of counsel and the fact that he already had agreed to be extradited.

"The Sixth Amendment does not mandate a right to counsel [in interstate extradition] proceedings, since an extradition hearing has a modest function not involving the question of guilt or innocence." *United States v. Doherty*, 126 F.3d 769, 782 (6th Cir. 1997) (internal quotation marks omitted), partially abrogated on other grounds by *Texas v. Cobb*, 532 U.S. 162, 121 S. Ct. 1335 (2001). Although most states provide a statutory right to counsel at such proceedings, "the invocation of a statutory right to counsel at an extradition hearing does not require the invalidation of a subsequent confession . . . even where the defendant is being extradited on the same crime on which he is ultimately tried, and the confession is in regards to that crime." *Id.* (citation omitted). Counsel, therefore, was not ineffective in failing to seek the suppression of Petitioner's confession on Sixth Amendment grounds.

For the reasons set forth above, Petitioner fails to show that he was deprived of the effective assistance of trial counsel and is not entitled to habeas relief on his second claim.

Petitioner's Fifth Amendment Claim

Petitioner argues that the state courts erred in concluding that he failed to invoke his right to remain silent and that his limited statements to the police were not the result of coercion. In rejecting this claim, the Michigan Court of Appeals wrote, in part:

> The record discloses that defendant was advised of his *Miranda* rights and, according to the interrogating officer, verbally acknowledged that he understood those rights.

> Contrary to defendant's argument, the record does not demonstrate that defendant asserted his right to remain silent. Although defendant refused to sign the advice of rights form, he continued to talk with the officer, albeit sporadically. He answered questions with brief responses, or by nodding his head, but he never said he did not want to talk or that he was not going to say anything. "When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant or a right to remain silent."

People v. Thompkins, No. 242478, at 2 (Mich. Ct. App. Feb. 2, 2004)(unpublished opinion)(internal footnote omitted)(quoting *People v. McReavy*, 436 Mich. 197, 222, 462 N.W.2d 1 (1990)).

In *Miranda v. Arizona*, the Supreme Court held that the interrogation of a suspect must cease when the suspect invokes his right to remain silent or his right to the assistance of counsel. 384 U.S. 436, 474, 86 S. Ct. 1602, 1627 (1966). If an accused wishes to invoke his right to counsel, however, he must do so unambiguously. *Davis v. United States*, 512 U.S. 452, 458-59, 114 S. Ct. 2350, 2355 (1994). As the Supreme Court held in *Davis*, ". . . if a suspect makes reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel our precedents do not require the cessation of questioning." *Id.* at 459, 114 S. Ct. at 2355 (emphasis in original). Although *Davis* concerned the right to counsel, "[n]onetheless, every circuit that has addressed the issue squarely has concluded that *Davis* applies to both components of *Miranda*: the right to counsel and the right to remain silent." *Bui v. DiPaola*, 170 F.3d

232, 239 (1st Cir. 1999) (collecting cases). "A refusal to sign a written waiver form does not conclusively indicate that the suspect wishes to remain silent. *Jones v. Dugger*, 928 F.2d 1020, 1027 (11th Cir. 1991) (citing *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755 (1979)).

The record does not establish that Petitioner clearly and unequivocally invoked his right to remain silent after Helgert advised him of his *Miranda* rights. While the officers did most of the talking during their meeting with Petitioner, Helgert testified that Petitioner sometimes nodded his head or verbally responded "yeah," "no," or "I don't know" in response to their dialogue. According to Helgert, Petitioner neither requested an attorney nor informed the officers that he did not want to speak to them. Petitioner's refusal to sign or initial the written waiver form, to provide a written statement to the police, and to answer some questions did not constitute an unequivocal assertion of his right to remain silent. The Michigan Court of Appeals' rejection of Petitioner's Fifth Amendment claim, therefore, was not an unreasonable application of clearly established law.

Petitioner also claims that his statements to the officers were involuntary, contending that they were coerced after three hours of interrogation and as a result of the officer's appeal to Petitioner's religious beliefs. The trial court found Petitioner's statements voluntary, reasoning:

> Here, there is no claim that the police subjected the defendant to threatened or actual physical abuse, or deprived him of food or medical attention. Additionally, the defendant was

> not injured or ill when he spoke to the detectives. . . . Further, the police did not detain the defendant excessively, especially given the serious nature of the crimes they were investigating.

People v. Thompkins, No. 01-78216, 5/10/02 Op. and Order Denying Def.'s Mot. to Suppress Statements at 3-4 (Kuhn, J.). The Michigan Court of Appeals held that "[t]he trial court did not clearly err in concluding that Defendant voluntarily waived his right to remain silent." *People v. Thompkins*, No. 242478, at 2 (Mich. Ct. Appeals Feb. 3, 2004). This Court finds that the state courts' decisions were neither contrary to nor an unreasonable application of clearly established law and that the trial court did not base its decision on an unreasonable determination of the facts. Under the totality of the circumstances, Petitioner's statements were obtained in a manner compatible with the Fifth Amendment. Except for Helgert's statements concerning Petitioner's religious beliefs, Petitioner fails to identify any facts rendering the circumstances of his interrogation coercive. An appeal to a suspect's religious beliefs does not, on its own, render the suspect's confession involuntary. *See Welch v. Butler*, 835 F.2d 92, 95 (5th Cir. 1988); *Barrera v. Young*, 794 F. 2d 1264, 1270 (7th Cir. 1986). As the Seventh Circuit noted in *Barrera*: "It is difficult to describe an appeal to religious beliefs as unacceptable in our society; such appeals are common parts of life and need not cease at the door of the jail." *Berrera*, 794 F.2d at 1270. Therefore, the mere fact that Helgert appealed to Petitioner's religious sensibilities, in the absence of any other coercive tactics, did not render Petitioner's confession involuntary. As the Court concludes that Petitioner did not exercise his right to remain silent when interviewed by Helgert and his partner,

the Court finds no merit to Petitioner's claim that the prosecutor improperly elicited evidence showing that Petitioner exercised this right. *See supra.*

Petitioner's Challenge to France's In-Court and Out-of-Court Identifications

Lastly, Petitioner claims that the trial court erred in failing to suppress France's in-court identification on the ground that it was the product of a suggestive pre-trial identification procedure. Petitioner argues that the still photograph from the surveillance video of Lou's Deli that the officers first showed to France the day after the shooting was unduly suggestive. Petitioner further asserts that the police subsequently visited France, showed him photographs of Petitioner, and told him that Petitioner was the shooter.

"The Supreme Court has held that an identification violates a defendant's right to due process where the identification procedure was so unnecessarily suggestive as to run the risk of irreparable mistaken identification." *Howard v. Bouchard*, 405 F.3d 459, 469 (6th Cir. 2005) (citing *Stovall v. Denno*, 388 U.S. 293, 301-02, 87 S. Ct. 1967 (1967) and *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972)). "It is the likelihood of misidentification which violates a defendant's right to due process." *Biggers*, 409 U.S. at 198, 93 S. Ct. 381-82. "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Braithwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977). Courts must consider five factors in determining whether an identification is so unnecessarily suggestive that it must be suppressed: (1)the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty

demonstrated by the witness at the confrontation; and (5) the length of time between the time and the confrontation. *Biggers*, 409 U.S. at 199, 93 S. Ct. at 382.

Having considered the above factors, this Court finds the state court's decision that France's identification of Petitioner was not unduly suggestive to be neither contrary to nor an unreasonable application of clearly established law. France initially observed Petitioner as Petitioner walked directly in front of the vehicle in which France was sitting. As Petitioner walked by France's car, he was staring at France and Morris and therefore likely drew their attention. France and Morris actually got out of their car and continued to watch Petitioner as Petitioner walked towards his van. As France testified at Petitioner's preliminary examination hearing, he never took his eyes from Petitioner. Moreover, France had the opportunity to observe Petitioner when the van pulled alongside Morris' car. The two vehicles were approximately four feet apart and Petitioner's window was open. The officers showed France a still photograph from the surveillance tape the day following the shooting. They did not tell France that anyone in the photograph was a suspect, but merely presented the photograph to France to determine whether the three individuals in the picture were the black males France described walking out of Lou's deli. France immediately identified Petitioner as the shooter and Purifoy as the driver of the van.

As France's initial identification of Petitioner was not unduly suggestive, it is not relevant whether the police pointed out Petitioner in other photographs during subsequent meetings. Moreover, France's subsequent in-court identification of Petitioner also was

not tainted. Accordingly, the Court concludes that Petitioner is not entitled habeas relief based on this claim.

Conclusion

For the reasons stated above, the Court concludes that the state courts' adjudication of Petitioner's claims was neither contrary to nor an unreasonable application of clearly established law or an unreasonable determination of the facts in the light of evidence presented in the state court proceedings. The Court therefore concludes that Petitioner is not entitled to habeas corpus relief.

Accordingly,

IT IS ORDERED THAT, Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **DENIED WITH PREJUDICE**.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
Elizabeth L. Jacobs, Esq.
Brad H. Beaver, Esq.

Order

Entered: July 29, 2004

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

125667

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 125667
COA: 242478
Oakland CC: 01-178216-FC

VAN CHESTER THOMPKINS, JR.,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the February 3, 2004 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

s0720

I, CORBIN R. DAVIS, Clerk of the Michiga . Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 29, 2004

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VAN CHESTER THOMPKINS, JR.,

Defendant-Appellant.

UNPUBLISHED
February 3, 2004

No. 242478
Oakland Circuit Court
LC No. 2001-178216-FC

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

The jury convicted defendant of first-degree murder, MCL 750.316, assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and three counts of possession of a firearm during commission of a felony, MCL 750.227b. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent prison terms of natural life without parole for the first-degree murder conviction, twenty-five to forty years for the assault conviction, and four to ten years each for the felon in possession and CCW convictions, to be served consecutive to three concurrent two-year terms for the felony-firearm convictions.

The jury convicted defendant for shooting Samuel Morris to death and for the non-fatal shooting of Frederick France. Defendant appeals as of right, and we affirm.

I. Defendant's Statements to the Police

Defendant argues that the trial court erred by denying his motion to suppress his statements to the police. Defendant asserts that the police improperly continued to interrogate him after he "implicitly" invoked his right to remain silent by failing to answer the officers' questions. See *People v McReavy*, 436 Mich 197, 218; 462 NW2d 1 (1990). We disagree.

The record discloses that defendant was advised of his *Miranda*[1] rights and, according to the interrogating officer, verbally acknowledged that he understood those rights. Contrary to defendant's argument, the record does not demonstrate that defendant asserted his right to remain

[1] *Miranda v Arizona*, 384 US 436, 477; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

silent. Although defendant refused to sign the advice of rights form, he continued to talk with the officer, albeit sporadically. He answered questions with brief responses, or by nodding his head, but never said he did not want to talk or that he was not going to say anything. "When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of a right to remain silent." *McReavy, supra* at 222. The trial court did not clearly err in concluding that defendant voluntarily waived his right to remain silent and that he did not subsequently invoke his right to silence. *People v Bender*, 452 Mich 594, 604-605 n 9; 551 NW2d 71 (1996); *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000). Defendant's statements were properly admitted into evidence.

II. Prosecutorial Misconduct

Defendant also maintains that the prosecutor's conduct denied him a fair trial. Prosecutorial misconduct issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court must consider the prosecutor's conduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). However, "appellate review of allegedly improper conduct by the prosecutor is precluded if the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *Schutte, supra*.

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." [*People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citations omitted).]

To the extent it was improper for the prosecutor to introduce evidence of codefendant Purifoy's criminal conviction, see *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982), defendant's substantial rights were not affected because the defense asserted that Purifoy was the shooter and that the evidence of Purifoy's conviction linked Purifoy to the gun. Further, the evidence did not show that codefendant Woodward was convicted in this matter. Therefore, this unpreserved issue did not prejudice defendant and, thus, does not warrant reversal.

Moreover, the prosecutor's rebuttal arguments were responsive to the defense arguments and did not shift the burden of proof to defendant. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Also, it was not improper for the prosecutor to comment on defendant's refusal to write out a statement during his police interrogation. A prosecutor properly may comment on a defendant's behavior and demeanor during a custodial interrogation. *McReavy, supra* at 221.

Similarly, it was not plain error for the prosecutor to question Purifoy regarding the contents of the letters that defendant sent to him in prison, or to draw inferences from the absence of certain statements in those letters. *Fields*, *supra* at 115.

Further, for the most part, the prosecutor's comments directed at defense counsel did not amount to an improper personal attack designed to shift the jury's focus to counsel's personality. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996). To the extent it was improper for the prosecutor to suggest that defense counsel would have presented a different story if the surveillance tape did not exist, the remark did not deny defendant a fair trial and a cautionary instruction, had one been requested, could have cured any resulting prejudice. Therefore, this issue does not require reversal. *Schutte*, *supra*.[2]

Additionally, we are not persuaded that reversal is required because of the prosecutor's questioning of Tomika Stephens or Detective Helgert. Where Stevens testified that she was defendant's girlfriend for six years, the prosecutor was permitted to examine her concerning the extent of her relationship and familiarity with defendant. To the extent the prosecutor's questioning of these witnesses suggested defendant's possible involvement in other criminal activities, we conclude that his substantial rights were not affected where the questioning did not directly refer to other specific crimes. Further, it was undisputed that defendant possessed several pieces of false identification when he was eventually arrested and the testimony suggesting defendant's possible involvement in other activities provided an alternative explanation for the false identifications apart from suggesting that they were attributable to defendant's involvement in the charged offense here. Accordingly, this unpreserved issue does not warrant reversal.

Though we agree that the prosecutor made an improper appeal to sympathy in his opening statement, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), the remark was brief and isolated, and the court's instruction to the jury that it could not let sympathy influence its decision was sufficient to cure any prejudice. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, this unpreserved issue does not warrant reversal.

III. Effective Assistance of Counsel

Defendant says that he was denied the effective assistance of counsel and that the trial court erred in denying his motion for an evidentiary hearing on this issue. To establish a claim of ineffective assistance of counsel, the burden is on the defendant to show that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is

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[2] Defendant also waived any error involving Purifoy's letters when he argued for their admission. *People v Riley*, 465 Mich 442, 448; 636 NW2d 514 (2001); *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995), and the prosecutor's argument that the various witnesses consistently identified defendant as the shooter was supported by the evidence and, therefore, was not improper.

a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

"If the record made before a defendant is convicted does not factually support claims he wishes to urge on appeal, he should move in the trial court for a new trial . . . and seek to make a separate record factually supporting the claims." *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Here, we agree that further development of the record is not required in order to resolve defendant's claims and, therefore, remand for an evidentiary hearing is not necessary. See also MCR 7.211(C)(1)(a)(ii).

Defendant argues that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct. For the most part, we found that the prosecutor's conduct was not improper and, to the extent some of the prosecutor's conduct could be viewed as improper, it did not affect the outcome. Therefore, defendant was not prejudiced by counsel's failure to object to these matters.

Also, defense counsel's decisions to stipulate to certain items were matters of trial strategy and defendant has not overcome the presumption of sound strategy. *Avant, supra; People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). We will not second-guess counsel's decisions.

We also agree with the trial court that defendant was not prejudiced by defense counsel's failure to request certain jury instructions. Although the court did not specifically instruct the jury that it could consider Purifoy's conviction only for purposes of his credibility, the record does not disclose an attempt to argue that conviction for an improper purpose. Further, defendant was not prejudiced by counsel's failure to ask for an instruction that Omar Stephen's prior conviction for a theft crime could be used for purposes of determining his credibility, considering that there was substantial evidence presented questioning his reliability and credibility as a witness. Nor was defendant prejudiced by counsel's failure to request a limiting instruction that defendant's prior felony conviction could be considered only for purposes of the felon in possession charge. The record does not reveal an attempt to argue that conviction for an improper purpose.

Defense counsel's stipulation that defendant had a prior, undisclosed felony conviction for purposes of the felon in possession charge and the trial court's instructions concerning that offense were sufficient to safeguard defendant's rights. Counsel was not ineffective for failing to request additional instructions. *Green, supra.*[3]

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[3] Defense counsel's decision to use the Purifoy letters was a matter of trial strategy, which we will not second-guess, *Avant, supra*; also, we agree with the trial court that defense counsel sufficiently attacked Omar Stephen's credibility. Defendant has not shown that counsel's efforts

(continued...)

For the foregoing reasons, defendant has failed to establish that he was denied the effective assistance of counsel.

IV. Identification Testimony

Defendant asserts that the trial court erred in denying his motion to suppress his identification by the surviving victim. "In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kuryczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

Contrary to defendant's argument, the record does not disclose that a photographic showup was conducted at the hospital on the morning after the shooting. Rather, the record indicates that the victim identified defendant from a series of surveillance photos that were taken at the location where the events surrounding the offense began. Although a photographic showup was subsequently conducted, the victim *did not* identify defendant at that showup.[4] There was also evidence that the victim participated in a second photographic showup, but it did not include defendant's picture and the victim failed to identify anyone. Because defendant was not identified in either of these two later photographic showups, there was no identification evidence to suppress, nor any basis for suppressing the victim's in-court identification.[5]

The trial court did not error in denying defendant's motion to suppress the victim's identification testimony.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly

(..continued)

in this regard were deficient. And, defendant has not shown that he was improperly interviewed in violation of his right to counsel.

[4] The victim explained later that he did not identify defendant at this time because the photo of defendant was an older one, taken when defendant was a juvenile, with a different hairstyle.

[5] Because defendant was not in custody, we find no merit to defendant's claim that the photographic showups were improperly conducted in the absence of counsel. *Kuryczyk, supra* at 302.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v- No. 01 178216 FC

CHESTER VAN THOMPKINS, JR.,

Defendant.
_____/

DAVID G. GORCYCA (P41352) OAKLAND COUNTY PROSECUTOR 1200 N TELEGRAPH RD PONTIAC MI 48340 248 858-0646	CORBETT EDGE O'MEARA (P54716) ATTORNEY FOR DEFENDANT 17212 MACK GROSSE POINTE MI 48224 313 417-3343

OPINION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

At a session of said Court held in the Courthouse in the City of Pontiac, County of Oakland and State of Michigan on May 10, 2002.

PRESENT: HONORABLE RICHARD D. KUHN, CIRCUIT JUDGE

This matter is before the Court on Defendant's Motion to Suppress Statements. The Court heard oral argument, conducted an evidentiary hearing, and took the motion under advisement.

Detective Helgert of the Southfield Police Department testified that on February 22, 2001, he and Detective Doweling met with the defendant at the Columbus County Jail in Ohio. Defendant was provided with a "Notification of Constitutional Rights" form and was asked to read one portion aloud as it

appeared on the form, and the detectives then read aloud the balance of the form. The defendant was asked if he understood the rights as read to him and he responded, "Yes." Defendant was then asked to sign the form. He orally declined to sign the form.

Although the defendant did not sign the form, he did not invoke his right to remain silent, nor did he request the assistance of an attorney.

An interview lasting between 2 ½ to 3 hours was conducted. Detective Helgert described it not as a question and answer session, but more as a monologue on their part, where they kept telling the defendant this was his chance to tell his side. The detectives did most of the talking, however Helgert testified that the defendant did make eye contact, nod, and answer questions with, "I don't know". The detective understood that the defendant was engaging in conversation when he made non-verbal communication.

Toward the end of the interview, Detective Helgert testified that he asked the defendant if "he believed in God", to which the defendant responded, "Yes." The detective continued by asking if he had "asked God for forgiveness for shooting that boy down?", and again the defendant replied, "Yes." Shortly after this exchange the interview was terminated.

Defendant was subsequently charged with murder in the first degree, assault with intent to commit murder, felony firearm, and carrying a concealed weapon.

The defendant asserts that his statements should be suppressed given the lengthy duration of the interview, and given that the police continued to ask him questions in an effort to compel a confession, despite his repeated implicit invocations of his right to silence.

The plaintiff contends that Defendant's statements were the product of free will and otherwise unconstrained. Plaintiff argues that the defendant chose to respond voluntarily to the questions presented to him.

In order for a confession to be admissible, the waiver of a defendant's Fifth Amendment rights must have been voluntarily, knowingly and intelligently made. *Edwards v Arizona*, 451 US 477, 482 (1981); *People v Abraham*, 234 Mich App 640, 644 (1999). The burden of proof is on the prosecution to prove voluntariness by a preponderance of the evidence. *People v Cartgon*, 128 Mich App 802, 805 (1983).

There is a two-part test, one for "voluntariness", and one for "knowingly and intelligently". *Abraham, supra*, at 644-645. "[T]he voluntariness prong is determined solely by examining police conduct." *Id.* Here, there is no claim that the police subjected the defendant to threatened or actual physical abuse,

or deprived him of food or medical attention. Additionally, the defendant was not injured, intoxicated or ill when he spoke to the detectives. Abraham at 645. Further, the police did not detain the defendant excessively, especially given the serious nature of the crimes they were investigating.

As for the second part of the test:

> To establish a valid waiver of *Miranda* rights, the prosecution need only "present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to presence of counsel, and that the state could use what he said in a later trial against him."

Id. at 647.

Here, the evidence showed that the detectives read the defendant his rights, and that he responded that he understood them. The defendant never invoked his right to remain silent, and participated in the interview by making eye contact, nodding, and answering questions with, "I don't know". Defendant then answered the two questions at issue. Defendant knowingly and intelligently waived his rights.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion to Suppress Statements is denied.

RICHARD D. KUHN

RICHARD D. KUHN, CIRCUIT JUDGE

A TRUE COPY
G. WILLIAM CADDELL
Oakland County Clerk - Register of Deeds
By _____
Deputy

Q Did he read them verbatim?

A Yes.

Q Okay.

And, did he indicate that he understood, if you recall?

A I don't --- I believe he understood it because he appeared literate, and appears --- coherent, reasonable, but I don't think I asked him that question.

Q Did you read him the other Rights on that form verbatim?

A I did, yes.

Q Do you recall asking him at the end of that, if he understood his Rights?

A I don't know that I orally asked him that question. There is a written question there that I addressed asking him, as I said, to initial and sign and write an answer as to understanding or no understanding, but --- I don't think I put the question to him orally.

Q Did he ever tell you he didn't understand any of them?

A No.

Q Did he ever ask for an attorney?

A No.

Q Did he ever tell you that he didn't want to talk to you?

A No.

Q What was his demeanor like?

A Peculiar. Sullen. Generally quiet. He was not especially communicative with us, with me. My partner and I did most of the talking in that interview. I had to direct his attention back to me.

Several times he would look down or look away and I would --- in interviewing somebody, interrogating someone I want to have eye contact. I want them to see me, and I want them. So, I would have to call him back and ask him to, you know, look at me and pay attention. Sometimes I had to ask for answers.

Q How long did you talk to him?

A About two and a half hours.

Q And, you indicated that you and Detective Dowling did most of the talking?

A Most of it.

Q What was the nature of the conversation, what were you telling him?

A Well, the way this interview or interrogation went was we started with a theme, there were a couple of themes that were employed.

Initially the theme was generally that we were there, he was caught for this homicide and before we went back to Michigan and talked to Prosecutors and Judges we wanted to hear his side of what happened,

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there were always two sides to a story.

He didn't provide any reasonable response, any significant response to that.

Q Did he talk --- did he say anything in response with respect to the case?

A Nothing of any significance.

Q Tell you he didn't do it?

A No.

Q Tell you Eric Purifoy did it?

A No.

Q Tell you Myzell Woodward did it?

A No.

Q You indicated ---

MR. O'MEARA: (Interposing) Your Honor ---

Oh, I withdraw, sorry.

Q **(By Mr. Bilkovic, continuing)** You indicated that was one theme you tried with him?

A Yes.

Q What next?

A We spoke to him about what --- in view of the fact that he wasn't providing information what did he think would happen?

I remember using the ostrich head in the sand metaphor. 'How do you think this is going to turn out

for you?' 'You need to help yourself, you need to put forth an explanation.' ' People are going to want to hear from you.'

We incorporated into our discussion with him the fact that Eric Purifoy was under arrest. We gave him disinformation, meaning we told him something that was not true. I told him that Eric Purifoy had --- you know provided information about his involvement and the entire episode.

We told him we had talked to Myzell, or 'Scoop', who I had learned that he knew, as I learned he knew Eric. None --- None of that generated any significant response.

As before he never denied that he did it. He never said that anybody else did it.

THE COURT: Counsel, we are going to break for lunch.

Ladies and Gentlemen of the Jury, remember, do not discuss this case among yourselves or with anyone else.

You are excused until one-thirty (1:30).

Would you lead the Jury out, please?

THE CLERK: Yes, Judge.

(Whereupon the Jury left the courtroom.)

* * *

(Whereupon the luncheon recess was taken.)

* * *

THE COURT: Sir, you may take the stand.

You have already been sworn in again, it won't be necessary to swear you in again, you are still under oath.

You may take the stand.

(Whereupon the Jury returned to the courtroom.)

* * *

Mr. Bilkovic you may continue.

MR. BILKOVIC: Thank you, your Honor.

C H R I S T O P H E R H E L G E R T

WAS THEREUPON CALLED AS A WITNESS HEREIN, AND AFTER HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION (Continuing)

BY MR. BILKOVIC:

Q Detective Helgert, before we left for the lunch break, you were talking about different tacts --- tactics that you were using, or attempting to use with the Defendant.

A Themes and approaches.

Q Themes and approaches, yes.

You indicated that you switched themes. You were telling the Jury some of the themes that you went through and what transpired.

A Well, I think I may be repeating myself a little from earlier testimony.

Initially we told the Defendant, 'We're hear. You're caught for this murder. We know you have a side, things aren't always as they appear and they are never one-sided. So, this is your opportunity to tell us that we take back to Michigan to show Prosecutors and Judges.'

I know I mentioned earlier that as things progressed or didn't progress I used the metaphor, the old ostrich with his head in the sand metaphor. 'What do you think is going to happen?' 'What do you think the outcome will be if you don't tell your side.' And that wasn't productive.

Q When you say 'productive' what do you mean?

What wasn't productive?

A It --- not only did it not illicit any admissions or denials, for that matter, it didn't really illicit any sort of reaction.

I said earlier, there were several times I had

to direct his attention back to me to make eye contact with me, just so we could truly converse with one another and see each other. He spent a lot of his time sitting on the --- in that school chair that I described, simply holding his head looking down.

Q While you were ---

A (Interposing) To the most ---

Q (Continuing) . . . while you were talking to him about the case making references to the chair?

A I was just going to say, the --- I remember two things that he did say, he said 'He didn't want a peppermint' that my partner offered him, and 'the chair that he was sitting in was hard.' By way of a complaint.

Q And, was that while you were talking to him about the murder that occurred in Southfield?

A Yes.

Q Did there come a point in time where you made the decision that you were getting close to the end of the interview?

Or discussion, I guess.

A Well, early on in the interview I wasn't very optimistic, but there came a time where in terms of --- Just as the interrogation was nearing an end, there was not much more to say. We had been very repetitive.

The last theme I employed, which was something I do frequently, it is just appealing to somebody's sense of morality or religion. In this case my question to the Defendant was, 'Do you believe in God?'

Q How did he respond?

A He said, 'Yes.

Q Did his demeanor change at all at that point?

A He made eye contact with me at that point, and he didn't cry. I believe I wrote in my report that his eyes turned glassy or moistened like that, you can look at someone and just when you see those eyes begin to shine a little bit.

My next question to him was, 'Do you pray to God?' And he told me, 'Yes.' And as soon as he said that I said, 'Do you pray to God to forgive you for shooting that boy down?' And he said, 'Yes.' And he looked down.

Q Did he paraphrase that or put qualifiers on that?

A That was --- I think I --- I believe I just quoted the conversation verbatim.

Q Did you give him an opportunity to write down his version of what happened?

A Before that portion of the interview, my partner, Detective Dowling, had pretty theatrically, he picked up

FORM CSR-LASER REPORTERS PAPER & MFG CO (800)626-5313

a blank tablet of paper, gone over, sat it down, took his pen out and laid it down. And he was very close to the Defendant.

And he said, 'Son, this is your opportunity to write down what happened.' The Defendant never touched the pen, never touched the tablet, and that tablet remained in place until the interview was concluded, which was within --- within minutes of the discussion about God.

Q I want to take your attention to March 6th, 2001. Did you have an opportunity to return to Meflen Township?

A Yes.

Q And, were you given any property when you returned to Meflen Township?

A We were given all the property that Meflen Township Police took from the Defendant after they chased him down and arrested him.

Q And, the identifications that were admitted in this case through Sergeant Parrish, were those some of the items that you were given?

A They gave me that from his property. I took them to Southfield's property and I caused them to come to court today.

Q Were you given any clothing that was being worn by the

one-thirty (1:30).

THE CLERK: Yes, Judge.

(Whereupon the Jury left the courtroom.)

* * *

THE COURT: The Court will be in recess.

(Whereupon the luncheon recess was taken.)

* * *

THE COURT: Are we ready to proceed?

Bring the Jury in, please.

THE CLERK: Yes, your Honor.

(Whereupon the Jury was returned to the courtroom.)

* * *

THE CLERK: You may be seated.

THE COURT: At this time the Court is going to recognize Mr. Bilkovic for purposes of closing argument.

MR. BILKOVIC: Thank you, your Honor.

Ladies and Gentlemen, this is a case about the relationship between these two people.

At Eric Purifoy's trial the Jury had to find, in order to find him guilty of First Degree Murder, that he drove up to that Rite-Aid and sat there, thereby assisting Van Thompkins.

He sat there and he watched Van Thompkins and allowed Van Thompkins to shoot somewhere between seven and ten (10) shots and then he calmly drove away. That

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is what they had to find to find him guilty.

So, what does he do? He twists it and indicates he hits the floor. Because, by hitting the floor he doesn't know what is going on.

Is that believable? Did Eric Purifoy's Jury make the right decision? I'm not here to judge that. You are not bound by what his Jury found. Take his testimony for what it was, twisted attempt to help not just an acquaintance but his tight buddy.

Remember one thing on the stipulation, those letters, they were in the possession of the Defendant until after the trial started. Violated an Order that they be turned over a year ago.

What do guilty people do that have the resources when they know they are being charged with a crime? They did exactly what he did, you take off. They drop their lives. And look at what he dropped?

He didn't just drop the van, he dropped Tomika and Lakeisha who love him with all of their heart. Dropped them. He dropped his mom, he dropped his grandmother, he dropped his friends, he dropped his child. Why? Because what he had done over a year. And, not just running and going into hiding, he was down in Ohio living out in the open, 'That's who I am, Isaiah Reed. Buying cars, driving around, hanging out.

FORM CSR LASER RECORDING PAPER & MFG CO 800-426-8310

No. 08-1470

In The Supreme Court Of The United States

MARY BERGHUIS, Warden,

Petitioner,

-vs-

VAN CHESTER THOMPKINS,

Respondent.

RECEIVED
JUL 23 2009
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SUPREME COURT, U.S.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PROOF OF SERVICE

The undersigned certifies that on July 21, 2009 she served Motion For Leave To Proceed *In Forma Pauperis,* Respondent's Brief In Opposition To Petition For Writ Of Certiorari and Appendix in suppot of Respondent's Brief by mailing same in an envelope bearing postage fully prepaid and plainly addressed as follows:

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July 21, 2009

William K. Suter
Supreme Court Clerk
1 First Street NE
Washington, DC 20543-0001

Re: Mary Berghuis v Van Chester Thompkins
No 08-1470

Dear Mr. Suter:

Enclosed please find original and 10 copies of Motion For Leave To Proceed *In Forma Pauperis*, Respondent's Brief in opposition to petition for writ of certiorari, Appendix in support of Respondent's Brief and original Proof of Service.

Thank you for your assistance.

Sincerely,

Elizabeth L. Jacobs

gdh

enclosures

RECEIVED
JUL 23 2009
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SUPREME COURT, U.S.

REPLY BRIEF

No. 08-1470

In the Supreme Court of the United States

AUG 28 2009

MARY BERGHUIS, Warden,
Petitioner,

v

VAN CHESTER THOMPKINS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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PETITIONER'S REPLY BRIEF

This case involves an important question of federal law that should be settled by this Court. Respondent's brief confirms that the Sixth Circuit added a new layer of prophylaxis to *Miranda* without an adequate rationale, making its decision sufficiently serious to merit review by this Court. Supreme Court Rule 10(a), (c).[1] Respondent does not attempt to defend the stated reasoning for the Sixth Circuit's decision. Instead, Respondent asserts in his brief that his conduct during the police interview constituted an invocation of his right to remain silent. But the Sixth Circuit decision expressly declined to reach the issue of the invocation of the right to remain silent, and instead it found that the right was violated because the right was never waived. Petitioner's shifting of the argument underscores the fact that the Sixth Circuit's decision departed from the mainstream form of analysis and instead expanded *Miranda's* protection in way not justified by this Court's decisions.

Moreover, with respect to the ineffective assistance of counsel issue, Respondent acknowledges in his brief that he was required to show that the State court's denial of the claim was not only erroneous but was also objectively unreasonable. Respondent defends the Sixth Circuit decision by pointing to the alleged importance of the limiting jury instruction he claims his counsel should have requested. But Respondent has not adequately responded to Petitioner's contention—which is supported by this Court's decision in *Strickland* itself—that the evidence of his guilt was so powerful that

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

it was not objectively unreasonable for the State court to deny relief despite the failure to request the instruction.[2]

I. The Sixth Circuit expanded the *Miranda* rule without adequate justification.

Respondent argues that his conduct following the receipt of the *Miranda* warnings constituted an invocation of this right to remain silent. This argument ignores the basis of the Sixth Circuit's decision, which expressly declined to reach the invocation issue. The Sixth Circuit candidly announced that it was departing from that standard mode of analysis:

> Because we conclude that the Michigan Court of Appeals unreasonably applied clearly established federal law in determining that Thompkins *waived* his right to remain silent, we do not need to resolve whether the state court further unreasonably applied clearly established law in determining that Thompkins failed to *invoke* his right to remain silent by in fact remaining substantively silent for nearly three hours. (emphasis added) [Appendix 29a]

If the Sixth Circuit had found that Respondent invoked his right to remain silent by his conduct, it would have erred, but the case would at least fit into the analytical framework established by this Court. Instead, it found that Respondent's statement to police was taken in violation of his right to remain silent because Respondent never waived that right despite his knowing receipt of *Miranda* warnings coupled with his statements

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[2] *Strickland v. Washington*, 466 U.S. 668, 694-695 (1984).

following a non-coercive conversation persuading him to cooperate. The distinction is critical because by avoiding the invocation issue, the Sixth Circuit has expanded *Miranda's* prophylactic rule.

A finding that a defendant invoked his right to remain silent has clear legal consequences. Under this Court's established law, if a defendant invokes his *Miranda* rights, questioning must immediately cease.[3] That principle is not at issue here. If Respondent had invoked his right to remain silent—as he now argues but contrary to the basis of the Sixth Circuit's decision—the police would have been prohibited from attempting to non-coercively convince him to make a statement. But this Court has never held that the police must cease communication with a suspect after he knowingly receives his rights and where the suspect does *not* invoke them. The question here is what procedure should be followed when a suspect expresses an understanding of his *Miranda* rights but neither invokes nor waives them. May the police then seek to convince the defendant to waive them by non-coercive means? And if the defendant does agree to cooperate by making a statement, can the statement itself indicate a waiver of his rights?

Respondent avoids these important questions in his brief in opposition. The Sixth Circuit answered them, however, by effectively adding a new layer of prophylaxis to *Miranda*—by prohibiting the police from communicating with a suspect after the knowing receipt of his rights until he has decided whether to invoke or waive his rights. The added protection is unwarranted by the principles on which *Miranda* was based. When the warnings have been understandingly received, the inherent coercion of the custodial interrogation has been

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[3] *Miranda*, 384 U.S. at 473-74.

dispelled and what remains is the prohibition against obtaining a confession that is the product of force, threats, or promises by the government:

> When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant 'reasoning' is the weighing of the rule's benefits against its costs. The value of any prophylactic rule must be assessed not only on the basis of what is gained, but also on the basis of what is lost.[4]

In *Miranda*, this Court created the rule that if a statement is obtained after warnings are given, it is admissible at trial only if the government meets its "heavy burden" of demonstrating that "the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[5] But a waiver need not be explicit. In *Butler*, this Court held that "an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case."[6] This Court explained that to show an implied waiver "mere silence is not enough," but that this "does not mean that the defendant's silence coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights."[7] Where—as here—a defendant verbally

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[4] *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009).

[5] *Miranda*, 384 U.S. at 475.

[6] *North Carolina v. Butler*, 441 U.S. 369 (1979).

[7] *Butler*, 441 U.S. at 373.

confirms an understanding of his right to an officer, there is more than mere silence.

Neither *Miranda* nor any other decision from this Court holds that interaction between the police and a suspect must cease between the warnings and the waiver. This Court has held only that the interrogation must cease if the defendant "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent[.]"[8] In other words, interrogation must stop only if a suspect invokes is rights, an issue that the Sixth Circuit explicitly avoided in this case. Instead, it found that the post-warning non-coercive communication rendered the subsequent statement involuntary. This ruling was not required by clearly established Supreme Court precedent under 28 U.S.C. § 2254(d) but rather constitutes an expansion of *Miranda's* protection and deserves consideration by this Court.

II. The weighty evidence of guilt allowed the State court to reasonably deny Respondent's ineffective assistance of counsel claim.

Respondent acknowledges the limitations that 28 U.S.C. § 2254(d) that put on the review of claims that were denied by the State court on the merits. But he argues only that because the limiting instruction was so important in light of the nature of the challenged evidence, that it was unreasonable for the State court to find that Respondent was not prejudiced by his counsel's failure to request it. The argument is not responsive to Petitioner's claim—that despite any instructional error—the evidence in this case was so powerful that it was not objectively unreasonable for the State court to find that there was a reasonable likelihood that Respondent would

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[8] *Miranda*, 383 U.S. at 473-74.

have been acquitted had his counsel requested the instruction.

This Court has held that the question of prejudice, when evaluating a claim of ineffective assistance of counsel, requires a weighing of the totality of the evidence before the trier of fact.[9] A guilty verdict only weakly supported by the record is more likely to have been affected by error than one with overwhelming record support.[10] And here, as outlined in the Petition, the trial evidence strongly indicated Respondent's guilt: (1) one of the intended murder victims survived and identified Respondent as the shooter; (2) Respondent admitted his guilt to another man; (3) Respondent's van which was used in the murder was stripped and dumped after the crime; and (4) Respondent fled the State and changed his identity after the crime. In light of this powerful evidence of his guilt, it was not objectively unreasonable for the State court to find no reasonable probability of acquittal no matter the nature of counsel's error.

---

[9] *Strickland*, 466 U.S. at 694-695.

[10] *Strickland*, 466 U.S. at 696.

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

Respectfully submitted

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Dated: August, 2009

JOINT APPENDIX

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(4)

No. 08-1470

Supreme Court, U.S.
FILED
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B456

In the Supreme Court of the United States

MARY BERGHUIS, WARDEN,
Petitioner,

v.

VAN CHESTER THOMPKINS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petition for Writ of Certiorari Filed May 26, 2009
Certiorari Granted September 30, 2009

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Sixth Circuit found that there was a violation of a person's right against self incrimination under the Fifth Amendment and Fourteenth Amendment.

The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself[.]"

The Fourteenth Amendment provides in Section 1 in part that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The prisoner challenged the basis of his confinement under 28 U.S.C. § 2254 of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

With regard to factual determinations by the State court under 28 U.S.C. § 2254(e)(1), the federal courts must accord a presumption of correctness unless rebutted by clear and convincing evidence:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATE OF MICHIGAN
IN THE SIXTH JUDICIAL CIRCUIT COURT
COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

VERSUS- File No. CR-2001 178216 FC

VAN THOMPKINS,
Defendant.
_____/

HEARING

Proceedings had in the above-entitled matter, held before the HONORABLE RICHARD D. KUHN, Judge of the Sixth Judicial Circuit Court, County of Oakland, on October 17th, 2001.

APPEARANCES:

PAUL WALTON
Assistant Prosecuting Attorney
Appearing on behalf of the People

CORBETT O'MEARA
Attorney-at-Law
Appearing on behalf of the Defendant

* * *

CHRISTOPHER HELGERT:

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* * *

[Page 73]
CHRISTOPHER HELGERT
WAS THEREUPON CALLED AS A WITNESS HEREIN, AND AFTER HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. WALTON:

Q Sir, would you please state your name for the record and spell your last name.

A Christopher Helgert, H E L G E R T.

Q Mr. Helgert, how are you employed?

A I am a police detective with the City of Southfield.

Q And, how long have you been employed with the Southfield P.D., sir?

A About six --- I'm in my seventh year.

Q If I can, sir, I would like to draw your attention back to the date of January 10th of the year 2000. Were you working as a detective at that time?

A Yes.

Q Sir, did you have any involvement in the investigation of a shooting at Nine Mile and Greenfield, in the parking lot of a Rite-Aid/Lou's Deli strip mall area?

A Yes.

Q What was your involvement, sir?

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A I believe the crime happened on the tenth (10th) of January.

I came in for work, I work days. I came in on the eleventh (11th), learned it had happened, and my partner, at the time, and I were given assignments, and I don't recall exactly what they were, that morning.

But to begin doing some follow up on them.

Q All right.

And, did you do the follow up, sir?

A Yes.

For many days we worked many hours working on it.

Q Okay.

Were you ever made aware of any other detectives obtaining a tape from Lou's Deli?

A Yes.

Q Did you have an opportunity to review that tape, sir?

A I have seen at least part of it since the incident.

Q Okay.

Were you ever involved with any interviews of Mr. Frederick France while he was at the hospital, sir?

A No.

Q Okay.

Were you ever involved with any photo array lineups done with Mr. France?

[Page 75]

A No.

Q What is the nature and the contact that you have had with Mr. France?

A I have had a lot of contacts with him, but I think the first time we met was when I served him a subpoena for one of the initial court appearances.

And, of course, I have kept up with him over the last going on two years.

Q Just by the way of brief history, sir. On the date of the eleventh (11th), when these photographs ---

Excuse me, if I could back up, just a step.

Have you had the opportunity to review a report by Detective Snyder and Detective Dziedzic concerning the photograph that was shown Mr. France while he was in Providence Hospital?

A Yes.

Q And, do you recall the date that that report was authored?

A I do not.

Q Okay.

I do. It was the eleventh (11th), the day following the incident.

Q Okay.

On the date of the eleventh (11th), sir, do you

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know if the Defendant --- do you know the Defendant in this case?

A I do.

Q Do you see him in court?

A He is next to Counsel, Van Tompkins.

MR. WALTON: Ask the record to reflect the identification of the Defendant in this case.

THE COURT: It may so indicate.

MR. WALTON: Thank you.

Q (By Mr. Walton, continuing) Sir, are you also aware of a gentleman by the name of Eric Purifoy?

A Yes.

Q And, was he a co-Defendant in this case?

A Yes.

Q Okay.

On the date of the tenth (10th), the eleventh (11th), were either Mr. Purifoy or Mr. Van Tompkins in custody?

A No.

Q Did you know of their names, sir?

A No.

Q When is the first time that you recall learning the name of either Mr. Van Tompkins or Mr. Purifoy?

A I don't recall the exact days. I am going to estimate

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that about maybe the thirteenth (13th). I know it was a weekend day I received a page from what turned out to be an informant who provided the name of the third person depicted in the picture, Myzel Woodward, and then over a series of phone calls provided the name of Eric Purifoy.

Q All right.

At the time you had received the information as to Eric Purifoy, was he in custody?

A No.

Q And, do you recall approximately when the Defendant, in this case, Van Tompkins, was taken into custody?

A I believe it was about February 23rd of this year.

Q Of the year two thousand and one (2001)?

A Yes.

Q So, this is a year, one month, and some odd --- a year and some odd days later, correct?

A About a year and a month, or something, yes.

Q All right.

So, up to that point he was not in custody?

A That's right.

Q Where do you recall the Defendant in this case being taken into custody?

A I believe the town is called Mithlin (phonetic), Ohio.

Q Okay.

[Page 78]

And, when he was taken into custody, sir, did you go to that location?

A Yes.

Q Did you go with any other officers?

A Detective Doweling, my partner.

Q Did you ever obtain a warrant for the Defendant's arrest in this case?

A Yes.

In --- it was still January of 2000.

Q Okay.

So, from January of 2000 to February of 2001 the Defendant --- you had a warrant for his arrest, but he was not in custody, to your knowledge?

A That's correct.

Q You indicated that you traveled to Ohio, sir?

A Yes.

Q Did you have contact with the Defendant while in Ohio?
A Yes.
Q Do you recall what date you had contact with him, sir?
A I believe it was the 22nd of February.
Q And, did you describe to the Court the nature of that contact, sir?
A He was being held pending extradition in the County Jail and serves Columbus, Ohio.
[Page 79]
We went to that jail on a pre-arranged basis. We provided with an interview room and the Defendant, Dave Doweling, my partner, and I met with him for just under three hours.
Q So, you interviewed the Defendant for approximately three hours?
A Yes.
Q Okay.
During that time, sir, did you ever provide the Defendant with the Miranda Rights?
A Yes.
Q What --- how did you advise him of his Rights, sir?
A I used an eight and a half (8-1/2) by eleven (11) sheet of paper that I believe is entitled 'Notification of Constitutional Rights', or something like that.
It enumerates five Rights. Basically the Right to Counsel, the Right to silence.
On that date I asked him to read me Number 5. He did that, and I established he could read. I then read Numbers 1 through 4 to him and that was how the notification was made.
Q I am going to show you People's proposed Exhibit Number 3 in this case and ask if you can identify this for the record (indicating)?
[Page 80]
A It is a photocopy of the Form I just discussed.
Q Is that the Form that you used in this case, sir?

A Yes.
Q Are those the Rights that you advised Mr. Van Tompkins?
A Yes.
MR. WALTON: Move for it's admission?
MR. O'MEARA: No objection.
THE COURT: Exhibit 3 may be admitted into evidence.
Q (By Mr. Walton, continuing) How far into the interview, sir, did you advise the Defendant of his Constitutional Rights?
A Right after we introduced ourself and I verified his identity.
Q You said you indicated that you established whether he could read, write, or understand the English language?
A I never established whether or not he would write. It was clear to me that he understood English, and that my reading Number 5 I believe he could read.
Q When the Defendant was advised of his Miranda -- - excuse me.
When you advised the Defendant of his Miranda Rights, did you read them verbatim as they appear on that form?
[Page 81]
A Yes.
Q Did the Defendant acknowledge the rights in any fashion?
A I believe I asked him if he understood the Rights, and I think I got a verbal answer to that as a 'yes'.
Q Did he indicate to you, sir, that he would be willing to waive his Rights?
A Well, he continued to talk with us very sporadically. But I had asked him to sign his name and I would have asked him for the date and the time on this Form to indicate more succinctly that they were read to him, that he was advised of them, and that he understood them. And he refused to sign anything.

Q Did he ever indicate to you, sir, that he wanted Counsel?
A No.
Q Did he ever indicate to you that he was unwilling to talk to you?
A No.
Q Did he ever indicate to you, sir, that he was invoking any of this Rights?
A No.
Q Sir, you indicated that the interview lasted for about three hours?
A Less than that, but two and a half to three hours, yes.
[Page 82]
Q During the course of this --- this interview, sir, did you ever obtain any substantive information concerning the events of January 10th of the year two thousand (2000) from the Defendant?
A I'm not quite sure what you mean by substantive events, but the interview was very, very one-sided. Mr. Thompkins shared very limited verbal responses with us.
Q Did you ask him if he was involved in the shooting, at all, sir?
A I don't think we asked him --- I don't think we approached on that basis. I think we approached it more on the basis that he was involved and that we were there, you know, this was his opportunity to explain his side. Everybody else, including co-Defendants, had given their version and this was his chance to explain his version of events.
Q Did he ever give you any verbal statement concerning his involvement, if any, sir?
A The only thing relative to his involvement would have been very near the interview, and again, it was so one-sided, he was so uncommunicative, I finally looked at him, and I asked him, tried to take a different tact, I

guess what I call a spiritual tact, whether or not he believed in God.

[Page 83]

He made eye-contact with me for one of the few times that he did for the interview. I saw his eyes well up with tears. He answered me orally and said 'Yes.'

I asked if he had prayed to God? And he said 'Yes.'

And I asked him if he had asked God to forgive him for --- I believe the words were, and I quoted them in my report verbatim" shooting that boy down." And he answered, 'Yes.'

Q At that point, sir, where did the interview go from there?

A He refused to --- not only did he refuse to write anything, but he wouldn't touch the pen or paper that my partner placed in front of him.

And he had nothing more of any consequence to say to us.

Q At that point, sir, was the interview terminated?

A Sometime shortly thereafter, yes?

Q How much time had passed away before the interview had ended?

A I am just going to guess maybe fifteen (15), twenty (20) minutes more.

Q During that fifteen (15), twenty (20) minute period of

[Page 84]

time, sire, was anyone else discussed?

A Not that I recall.

Maybe if I looked at my report it may refresh my memory.

(Whereupon a brief delay was had.)

* * * [in original transcript]

No, I don't believe so. The only other quote that I attributed to him, after that, was 'I ain't writing nothing down.'

(Whereupon a brief delay was had.)

* * * [in original transcript]

MR. WALTON: I have nothing further, your Honor.

THE COURT: Counsel?

CROSS-EXAMINATION

BY MR. O'MEARA:

Q Hi, Detective.

So, at one-thirty (1:30), or before one-thirty (1:30) in the morning you wind up in a little room with Mr. Tompkins?

A It was afternoon, but it was about one-thirty (1:30) in the afternoon.

Q Or, p.m., sorry.

About one-thirty (1:30) in the afternoon. And you've got two detectives with you, right?

[Page 85]

A Just two of us, myself and Dave Doweling.

Q You started off by introducing yourself?

A (No verbal response.)

Q And telling him what you were there about, right?

A I'm not even sure we told him initially.

He walked in, I remember distinctly reaching out to shake his hand, I introduced myself and Doweling, or vis-versa, and asked him what his name was and he did say his name. And I verified that off his wristband.

Q And, then you informed him --- you read him his notification of his Constitutional Rights?

A Yes.

Q And, you read him the five Rights that are enumerated on this piece of paper?

A I read four and I asked him to read me the fifth one, which is my typical practice.

Q And, you asked him to initial that, or would it be your common practice --- the reason to read number five is this sentence:

"Do you understand each of these Rights that I have explained to you?"

Correct?

A Yes.

Q And, there is a little space there, right?
[Page 86]
A Yes.
Q And, it would be your practice at the point in time after you---you informed him of his Constitutional Rights to have him initial, or sign, or indicate 'yes' on this line right here (indicating)?
A That's right.
Q So later I couldn't come in to court and say, 'Well, he didn't understand his Rights.' Right?
A He could still say that. But my practice would be to have him initial one through five, if he understands his Rights to indicate typically with the word 'yes', initial that and then sign, date and time it.
Q And, you would explain to him that by signing this he wouldn't be waiving any of his rights, he would merely be acknowledging that you had explained to him his Right?
A That's what I usually tell people.

I don't tell them they are not waiving it, I just ask them to initial, to indicate that I read them to them.
Q And, then you would indicate that was what their signature is? Or that their signature is an indication that they understood these Rights?
A Yes.
[Page 87]
Q And you explained that to Mr. Tompkins?
A Yes.
Q Because he said, 'I won't. sign anything.' Right?
A I don't think those were his exact words, but he did refuse to sign verbally, yes.
Q And then you would have taken steps to assure him that signing isn't --- you know you are not giving up anything up by signing it is just merely shows that I have told you your Rights?
A Well, we had some discussion about that and I --- the theme of the discussion was more along the lines

that we had to advise him of his Rights before we talked to him.

And the purpose of us wanting to talk to him was to acquire his version of events, because the theme would have been, of course, there is always sides to any of them.

Q And, starting right from the very beginning he was indicating to you his unwillingness to cooperate with this conversation?

A No, his only unwillingness was to sign anything.

Q He also --- you also, subsequent to this, started asking questions, right?

You told him that 'This is your opportunity to give a statement, right?

[Page 88]

A No. We --- well, there is a difference. We didn't start interrogating him, but we did tell him, because we believed it was necessary for him to waive his Rights. We would advise him of his Rights, we would like him to sign the Form and indicate that in writing so we could more easily move forward and document that and then let him tell his side of the story.

Q But regardless of all conversation you had with him about whether or not he was going to sign and acknowledge his Rights, he refused to sign and acknowledge that he understood his Rights, or that his Rights had been explained to him.

A He refused to sign the Form.

Q And, your purpose in being down there, you went down there right after he had been arrested, right?

A That's right.

Q And, you understood that there was an extradition proceeding, and because he was arrested in Ohio he waived extradition it was going to take a few days or a couple of weeks to get him back up here to Oakland County, right?

A Yes, sir.

Q So, you weren't down there to pick him up and bring him back to Oakland County, were you?
[Page 89]
A That's correct.
Q You were down there to get a statement from him, right?
A That's Correct.
Q It was your purpose or your investigative tool to go down there and try to elicit from him information which would help you and help the Prosecutor in the prosecution of whoever was guilty of this offense.
A Our purpose was to go down and interview him and gain whatever information we could.
Q And, so, when you were having this conversation after he refused to sign this Advice of Rights Form, your purpose--- you wouldn't say, 'This is your opportunity to give your version of events, and then you would pause and give him some opportunity to give his version of events, right?
A No.
Q You just continue --- you never gave him an opportunity to respond?
A The window was that we advised him of his Rights. We tried to persuade him to sign his Rights Form and make the initials and so on, and he wouldn't and then we did enter into an interview mode.
Q I appreciate that. I am not going to ---- I'm not trying to indicate to you that you were trying to interrogate
[Page 90]
him while you gave him his Rights.

I am trying to move on from there. During the body of this --- this two hour and forty-five (45) minute, at least, interaction you had with Mr. Tompkins, the bulk --- and this Miranda Form, and I think he showed it to you it had one-thirty (1:30) p.m. written at the bottom of it where you signed. That would be the time when you

had attempted to advise him of his Rights and made the notations on here about him refusing to sign, correct?

A Yes.

Q And so then if it indicates at the end of your report that you departed at approximately four-fifteen (4:15) p.m. you talked to him for two hours and forty-five (45) minutes after you dispensed with advising him of his Rights, is that correct?

A Yes, that's about right.

Q And, that whole period of time is you using your skills as a detective and your training as a detective, and your experience as a human being, and police officer to attempt to illicit from Mr. Tompkins information which might be pertinent to your investigation for this offense?

A Yes.

[Page 91]

Q And you would use different, and I don't mean for you to reveal them to me if they are top secret or anything, but you use different investigative questioning or conversational tools to elicit from Mr. Tompkins responses, is that true?

A I don't think there was a real variety. Pretty much the approach that we made with Mr. Tompkins, the Defendant, was that --- just that 'This is your chance to provide your version. Eric Purifoy's provided a version, witnesses have provided versions, you know, what happened out there. Maybe those boys drew down on you.'

And ---

Q And for two hours --- your indication is that this, 'Have you prayed to God?' business happens about fifteen (15) minutes before you leave, right?

A Sometime fairly shortly before we leave.

Q So probably between like three-forty-five (3:45) and four-fifteen (4:15)?

A Very likely.

Q And so, it is very likely that from one-thirty (1:30) to three forty-five (3:45), for two hours and fifteen

minutes (15), you are using --- not using, but you are engaging this theme, 'Now's your chance to give a statement.' Right?
[Page 92]
A It was nearly a monologue, not completely, but nearly.
Q But you were certainly giving him an opportunity to interrupt your monologue and spill his guts to you, right?
A Well, we hoped he'd talk to us.
Q And you were giving him an opportunity to do that, correct?
A Yes.
Q And, he repeatedly declined to take advantage of the opportunities you were giving him to participate in the conversation, right?
A That's probably right. I don't think I would characterize it quite that way, but he was not verbally communicative.
Q You would ask him a question or make a statement that you thought would indicate a response and he would not respond.
Is that true?
A That is somewhat true, the characterization is not quite right. It wasn't so much as a question and wait for an answer, when it appeared that he simply wasn't going to be very responsive we were mostly making statements about, 'This is your chance to tell', and kind of a monologue expressing that theme to encourage him to
[Page 93]
submit to the interview.
Q You were idea --- I don't meant to interrupt, but you were getting --- you consistently, repeatedly, got the idea that he didn't --- that he wasn't interested in responding, right?
A For that period of time he was not very cooperative or responding, that's right.

Q You would indicate to him, some way or another, 'Here's an opportunity to respond.' Then you would give him that opportunity to respond, right?
A Yes.
Q And he wouldn't respond, right?
A Not much, that's correct.
Q And then you would give him --- give him another opportunity to respond, maybe talk a little while more, however you do it, and give him another opportunity to respond and he would, again, not respond, right?
A Again, not to be repetitive, but not much.
Q And, never, never, ever in this two hours and forty-five (45) minutes responding with anything that was, at all, substantive which was all --- which was at all the substance of your purpose for being down there, which would be some sort of information or indication of what happened on --- back in January the year before in front
[Page 94]
of Rite-Aid?
A Again, not much.
Q He consistently, every time you gave him an opportunity between one-thirty (1:30) a.m. and three forty-five (3:45) a.m. ---

THE COURT: (Interposing) I don't believe it is a.m.

MR. O'MEARA: Oh, p.m. I apologize your Honor.

THE COURT: No problem.

MR. O'MEARA: Temporarily disadvantaged.

Q (By Mr. Defendant, continuing) But consistently between one-thirty (1:30) and three-forty-five (3:45), for two hours and fifteen (15) minutes every time you gave him an opportunity to participate meaningfully in the conversation he exercised his right to remain silent?

MR. WALTON: Objection, argumentative.

THE COURT: He may answer the question, if he knows.

THE WITNESS: Largely he remained silent, that's correct.

Q (By Mr. Defendant, continuing) And yet you continued to give him another opportunity to participate with you in a conversation about the murder, you believe, he had committed.

[Page 95]

A That's correct.

That's the nature of an interview.

Q You did not, upon his first --- the first time he indicated to you that he was exercising his Right to remain silent terminate the interview, did you?

A He never indicated to me that he was going to exercise his Right to Remain Silent.

Q He exercised his Right to Remain Silent, didn't he?

A That's an interpretation. My --- my ---

Q (Interposing) I withdraw the question.

THE COURT: The question has been withdrawn.

Q (By Mr. Defendant, continuing) He remained silent, didn't he?

A Largely.

Q Did you terminate the conversation, the interview upon him remaining silent?

A Absolutely not.

Q Did you go on and invite him, or give him another opportunity to speak or participate in the conversation?

A Yes.

Q Did he, again, remain silent?

A Much of the time.

Q Did you terminate the conversation the second time he remained silent?

[Page 96]

A Absolutely not.

Q Do you know how many times he remained silent and you continued the interrogation prior to this supposed statement 'That he prayed over the shooting of this boy?'

A What --- I'm not able to answer how many times he remained silent, because ---

Q (Interposing) Could it have been ten (10)?

A I'm not able to answer it in terms of what that means, not numerically.

Q He exercised it continuously for two hours and forty-five (45) minutes in terms of substantive responses to your attempts to elicit statements regarding this offense, is that fair to say?

A Much of the time. Most of the time, yes.

Q And then you took another tact, is the way you testified on direct examination, which was then you were --- you said, 'Do you believe in God?' Right?

A Yes.

Q And, you didn't care whether or not he believed in God, did you?

A Well I did care if he did have a deep faith it would probably more vulnerable.

Q More vulnerable to interrogation?

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A Yes, sir.

Q More likely to --- to confess?

A More likely to tell the truth.

Q And, you made that statement, it was your purpose, when you made that statement, 'Do you believe in God?' And then you made the subsequent statement, 'Have you prayed to God to forgive you for shooting that boy down?'

Your purpose in making those statements was to elicit from Mr. Thompkins the truth?

A Yes.

Q And, that was after he had consistently exercised his right to remain substantively silent for at least two hours and forty-five (45) minutes?

A Yes, that's right.

MR. O'MEARA: I don't have any further questions.

THE COURT: Mr. Walton, anything further?

MR. WALTON: Yes.

REDIRECT EXAMINATION

BY MR. WALTON:

Q Did he invoke any of the Rights, sir?

A No, sir.

Q You said that, 'For the most part he remained silent.'

Tell me a little bit about the monologue. You asked him a question, correct? Or make a statement?

[Page 98]

A Just simply talk. I would talk and Detective Doweling talked, but just repeating that theme. Being really quite repetitious in the monologue, 'This is your opportunity to talk. What do you think is going to happen? Who is going to speak up for you if you don't speak up for yourself?'

That overall theme.

Q Okay.

And, you said there were times that he responded, correct?

A Yes.

Q And, his response for what, to engage you in conversation, or simply say something to the effect that 'I'm not talking to you.'

A Never 'I'm not talking to you.' Sometimes it would be eye-contact, sometimes it would be a nod of the head, sometimes, I know the words, 'I don't know.' was quite prevalent.

Q Okay.

During this conversation or during this discussion that you are having with the Defendant, did he ever indicate that 'I am not saying anything.'

A No, sir.

Q Did he ever indicate, 'I don't want to talk to you.'?

[Page 99]

A No.

Q Did you ever have any discussions about an attorney with him?

A Never.
Q Okay.
Other than the Advise of Rights, correct?
A That's right.
Q All right.
Now, did he ever indicate to you he wanted Counsel?
A No.
Q That he wanted to end the questioning?
A No. He never invoked any of those Rights.
Q Okay:
There were times when he simply didn't answer your question, correct?
A He sat there and listened to our speech, if you will, most of the time.
Q Okay.
And, when he didn't respond, did you harp back on that or did you move to the next topic?
A We didn't move very much through topics, that was pretty much the topic. Here's what happened, you know, here's some of the evidence. And we wouldn't have shared all of the evidence with him, but 'This is your opportunity,
[Page 100]
who's going to tell if you don't?'.
Q Now, I note on People's Exhibit Number 3 in this case that there are a couple of notations on here.
There is the printed Advice of Rights, correct?
A Yes.
Q And then there is some handwritten portion, correct?
A Yes.
Q And there is something in here on the bottom that says 'Original' in red, correct?
A Yes.
Q Who wrote the notes on People's Exhibit Number 3, sir?

A With the understanding that this is the Rights Form that was used at the time he was extradited back to Michigan, all of this handwriting is mine.

Q Okay.

And, those notes in form and substance indicate that the Defendant refused to sign the Form, correct?

A That's right.

Q And, also, it indicated that on the return trip home to Michigan the Defendant indicated he was not sick or injured in any fashion?

A I don't believe that we discussed him being sick or injured, but when he walked he walked fine. There were no obvious injuries, never appeared sick.

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Q Okay.

When you spoke with the Defendant, did he appear intoxicated at all?

A No.

Q When he chose to communicate with you, did he have any problems communicating with you?

A No.

Q Okay.

You said that you both --- you got both verbal and non-verbal responses?

A Well, my previous testimony was all pertaining to the twenty-second (22nd) of February, when we went to Ohio to talk to the Defendant prior to extradition.

So, are you now talking about the 6th of March?

Q I'm sorry. I am referring specifically to your discussions with him in Ohio.

A Okay.

Q You said you got both verbal and non-verbal?

A Yes.

Q What do you mean by non-verbal?

A Sometimes it would be a word or two. A 'yeah', or a 'no', or 'I don't know.'

Sometimes a nod of the head. And sometimes because he looked --- he simply sat down like I'm sitting

[Page 102]
(indicating) with my head in my hands looking down. Sometimes it was just something he would look up and make eye-contact would be the only response.
Q Okay.
Did you take these non-verbal responses to be also to be engaging in a conversation?
A Well, as limited as it was, yeah, that's what he was doing.
Q Okay.
Um ---
I have nothing further.
THE COURT: Anything further?
MR. O'MEARA: No, sir.
THE COURT: You are excused, sir.
THE WITNESS: Thank you.
THE COURT: You may step down. Watch your step, please.
We are going to be in recess.
Mr. Prosecutor, do you want to take your Exhibits?
MR. WALTON: Thank you.
Counsel, do you have any objection me retaining copy of these Exhibits?
MR. O'MEARA: No.
THE COURT: Counsel, do you want to approach the
[Page 103]
Bench.
(Whereupon a discussion was held at the Bench, out of the hearing of the Court Reporter.)
* * *[in original transcript]
THE COURT: The Court will be in recess.
(Whereupon the matter was concluded.)
* * *[in original transcript]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v- No. 01 178216 FC

CHESTER VAN THOMPKINS, JR.,

Defendant.
_____/

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_____/

OPINION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

At a session of said Court held in the Courthouse
in the City of Pontiac, County of Oakland
and State of Michigan on May 10, 2002.

PRESENT: HONORABLE RICHARD D. KUHN, CIRCUIT JUDGE

This matter is before the Court on Defendant's Motion to Suppress Statements. The Court heard oral argument, conducted an evidentiary hearing, and took the motion under advisement.

Detective Helgert of the Southfield Police Department testified that on February 22, 2001, he and Detective Doweling met with the defendant at the Columbus County Jail in Ohio. Defendant was provided with a "Notification of Constitutional Rights" form and was asked to read one portion aloud as it appeared on the form, and the detectives then read aloud the balance of the form. The defendant was asked if he understood the rights as read to him and he responded, "Yes." Defendant was then asked to sign the form. He orally declined to sign the form.

Although the defendant did not sign the form, he did not invoke his right to remain silent, nor did he request the assistance of an attorney.

An interview lasting between 2 ½ to 3 hours was conducted. Detective Helgert described it not as a question and answer session, but more as a monologue on their part, where they kept telling the defendant this was his chance to tell his side. The detectives did most of the talking, however Helgert testified that the defendant did make eye contact, nod, and answer questions with, "I don't know". The detective understood that the defendant was engaging in conversation when he made non-verbal communication.

Toward the end of the interview, Detective Helgert testified that he asked the defendant if "he believed in God", to which the defendant responded, "Yes." The detective continued by asking if he had "asked God for forgiveness for shooting that boy down?", and

again the defendant replied, "Yes." Shortly after this exchange the interview was terminated.

Defendant was subsequently charged with murder in the first degree, assault with intent to commit murder, felony firearm, and carrying a concealed weapon.

The defendant asserts that his statements should be suppressed given the lengthy duration of the interview, and given that the police continued to ask him questions in an effort to compel a confession, despite his repeated implicit invocations of his right to silence.

The plaintiff contends that Defendant's statements were the product of free will and otherwise unconstrained. Plaintiff argues that the defendant chose to respond voluntarily to the questions presented to him.

In order for a confession to be admissible, the waiver of a defendant's Fifth Amendment rights must have been voluntarily, knowingly and intelligently made. *Edwards v Arizona*, 451 US 477, 482 (1981); *People v Abraham*, 234 Mich App 640, 644 (1999). The burden of proof is on the prosecution to prove voluntariness by a preponderance of the evidence. *People v Carigon*, 128 Mich App 802, 805 (1983).

There is a two-part test, one for "voluntariness", and one for "knowingly and intelligently". *Abraham, supra*, at 644-645. "[T] he voluntariness prong is determined solely by examining police conduct. " *Id.* Here, there is no claim that the police subjected the defendant to threatened or actual physical abuse, or deprived him of food or medical attention. Additionally, the defendant was not injured, intoxicated or ill when he spoke to the detectives. *Abraham* at 645. Further, the police did not detain the defendant excessively,

especially given the serious nature of the crimes they were investigating.

As for the second part of the test:

> To establish a valid waiver of Miranda rights, the prosecution need only "present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to presence of counsel, and that the state could use what he said in a later trial against him."

Id. at 647.

Here, the evidence showed that the detectives read the defendant his rights, and that he responded that he understood them. The defendant never invoked his right to remain silent, and participated in the interview by making eye contact, nodding, and answering questions with, "I don't know". Defendant then answered the two questions at issue. Defendant knowingly and intelligently waived his rights.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion to Suppress Statements is denied.

RICHARD D. KUHN
RICHARD D. KUHN, CIRCUIT JUDGE

STATE OF MICHIGAN
IN THE SIXTH JUDICIAL CIRCUIT COURT
COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

VERSUS- File No. 2001-178216-FC

VAN CHESTER THOMPKINS, JR.,
Defendant.
_____/

TRIAL

Proceedings had in the above-entitled matter, held before the **HONORABLE RICHARD D. KUHN**, Judge of the Sixth Judicial Circuit Court, County of Oakland, on May 13th, 2002 (1st day).

APPEARANCES:
MARK BILKOVIC
Assistant Prosecuting Attorney
Appearing on behalf of the People

CORBETT O'MEARA
Attorney-at-Law
Appearing on behalf of the Defendant

* * *

[Page 20]
[Mr. Bilkovic continuing] Anybody ever had any type of contact with a police officer whether it was a speeding ticket or anything else? Lets see a show of hands?
THE JURORS: (Indicating).
MR. BILKOVIC: Okay.
I'm not going to go into that.
Juror Number 3, you indicated that you did?
THE JUROR: What?

MR. BILKOVIC: You've gotten a speeding ticket before?

THE JUROR: Oh, no, I haven't had a speeding ticket.

MR. BILKOVIC: Any other type of tickets, pulled over by a police officer before?

THE JUROR: Yeah. I got in an accident.

MR. BILKOVIC: Okay.

Were you ticketed as a result of the accident?

MR. BILKOVIC: Okay.

We'll go to somebody else?

Juror Number 4, I believe you raised your hand?

THE JUROR: Yes.

I had a couple of speeding tickets.

MR. BILKOVIC: Oakland County or not in Oakland County?

THE JUROR: Yes, Oakland County.

[Page 21]

MR. BILKOVIC: How do you feel you were treated?

THE JUROR: Fairly.

MR. BILKOVIC: Okay.

Was anybody here, and I --- anything down to a speeding ticket, does anybody feel that at some point in time you have ever been treated unfairly by a police officer?

THE JURORS: (No verbal response.)

MR. BILKOVIC: So, everyone was speeding then?

THE JURORS: (No verbal response.)

MR. BILKOVIC: One of the charges, as you know now in this case, is First Degree Premeditated Murder. It doesn't get more serious than that.

Is there anybody here, hearing the seriousness of it --- hearing the seriousness of the charges who doesn't think they would be able to sit in judgment of somebody on a case like this?

THE JURORS: (Indicating).

MR. BILKOVIC: Juror Number 1?

THE JUROR: I think the only reason I would think I wouldn't give a fair judgment maybe because my language and I don't understand some of the words and things like that.

MR. BILKOVIC: Do you have some concerns you might not be able to understand everything that is being said?

* * *

[Page 23]

THE JURORS: (No verbal response.)

MR. BILKOVIC: One of the names that is going to come up during the trial is the name Eric Purifoy. You will hear that he was present at the time of the shooting, and he was eventually charged in this case.

I anticipate at this point that he is going to testify about what he saw. Without hearing Mr. Purifoy, without seeing Mr. Purifoy, is there anybody here that is thinking, right now, just based on what I told you, that there was no way that you could listen to somebody like that and believe somebody like that was involved in a situation like this?

THE JURORS: (No verbal response.)

MR. BILKOVIC: Miss Kessler, what about you?

I am not picking on you.

THE JUROR: No.

MR. BILKOVIC: It's just that I remembered your name.

What about you?

THE JUROR: I would have no problem.

MR. BILKOVIC: Okay.

The Judge will instruct you that you have to listen to witnesses, and you have to judge their credibility based on what they say, how they say it, and how their testimony lines up with the other evidence in the case.

* * *

[Page 63]
[Opening Statement by Mr. Bilkovic continued]
And Frederick France will tell you about that today.

At that point Detectives put out these photographs out to the public. They wanted people on the streets to be talking and see this information. Those photographs were put in the paper, wanted flyers were made, and they were broadcast on the local news media. A couple days later the driver, the person in the middle, turned himself in to the police. You will hear that that person is an individual by the name of Eric Purifoy.

Eric Purifoy is going to testify in this case. He is going to tell you, and you will learn that he was charged with First Degree Murder as an Aider and Abettor because he was driving the car at the time of the shooting as well as several gun charges. And, you will learn that while he was acquitted of the Murder charges, he was found not guilty at a Jury Trial, because he had a gun in his vehicle, and drove away with a gun in his vehicle he was found guilty and pled guilty to some weapons charges and is currently doing a six year prison sentence.

He is going to tell you what happened at that ---he is going to tell you that the three people in that surveillance photograph were the Defendant, himself, Mr. Purifoy, and a third individual by the name of Myzel Woodward.

* * *

[Page 95]
[Q by Mr. Bilkovic; A by Pamela Biesley]
A Um --- I activated lights and sirens and did an emergency response to that location of the shooting.
Q Okay.

After you received the dispatch, how long did it take you to get to the Rite Aid?

A Maybe one to two minutes, tops.
Q What --- Do you recall what the weather conditions were like on this evening?
A I don't recall any type of bad weather. I mean it was probably a little cold, but nothing --- no --- the road conditions were good.
Q Nothing by way of rain or snow, or fog, or anything to obstruct your vision.
A No.
Q When you arrived at that location, did you notice anything?
A Yes. There was a Baretta, it was running, unoccupied. The headlights were on, it was facing south in the parking lot and it had several bullet holes in it, in the door.
Q When you say Baretta, you're talking about a red Chevrolet Baretta?
A Yes.

There was also a group of people standing to the rear of that Baretta.

* * *

[Page 101]
[Q by Mr. Bilkovic; A by Pamela Biesley]
A Yes.
Q And, what would that be, if you remember?
A Francis --- I don't recall his last name.
Q Frederick France?
A Yes.
Q Did you have an opportunity to speak with Mr. France?
A Yes.
Q And, when you had this opportunity to speak with him, where were you at and where was he at?
A Right at the scene, and he was still sitting down, because I didn't want him to move.

Q Was he still acting scared and excited the way you described?
A Yes, he was extremely excited.
Q What did he tell you?
A He told me that he had --- him and his friend, the subject that was laying there had been in a verbal altercation with a group of males in a white van. And that they had opened fire on them as they were driving through the parking lot.
Q Did he give you any further description of these individuals?
A Not of the subjects, just the van. He said it was a conversion style van.
Q What happened next?

* * *

[Page 110]
[Q by Mr. Bilkovic; A by James Szabo]
THE COURT: (Interposing) Watch your step please.
Q (By Mr. Bilkovic, continuing) Mark it where you were parked?
A (Indicating).
Q Now, when you were parked in that location, was there anybody else in your vehicle with you?
A No.
Q What type of car were you in?
A Ford Exposition, four-wheel drive.
Q And, what type of direction were you parked?
A I was facing Greenfield Road.
Q So, in order to look at the Rite Aid Pharmacy, which direction would you have to turn your head?
A I would look to my right.
Q Was there anybody parked next to you on the right hand side?
A No.
Q What was the weather like that evening?
A It was fairly clear.

Q Rain, snow, anything like that?
A (No verbal response).
Q Was that a 'no'?
A No, there was not.
Q With respect to the lighting conditions in the parking
[Page 111]
lot, are you aware of whether or not back in January of 2000, did that parking lot have lights?
A Yes, it did.
Q And, do you recall if they were working?
A Yes, they were.
How would you describe the lighting in the parking lot?
A There are two poles here (indicating) and here (indicating), and each pole had four lights on.
Q And, how would you describe the strength of those lights?
A The parking lot is very well lit.
Q Is there any lighting that runs along the business step, that you were aware of?
A Yes, under the canopy here (indicating), right in front of all the stores there is an traditional cellular type lighting.
Q Was your store open of closed at nine o'clock (9:00)?
A We close at nine.
Q Was there anybody inside your store?
A Two employees.
Q When you were outside in your --- in the parking lot, what were you doing?
A I was talking to a friend on my cellphone.
Q And, when you were talking to your friend on the
[Page 111]
cellphone, did you hear something that attracted your attention?
A Yes, I heard multiple gunshots.

Q When you say 'multiple gunshots', do you recall how many, approximately you heard?
A Approximately five to seven.
Q Do you recall how far apart these gunshots were?
A They were in fairly rapid succession. I believe there were two, a very brief pause and four or five more.
Q Were you able to determine, if you could tell, what direction they were coming from?
A Yes. I immediately turned to my right.
Q Why did you turn to your right?
A The sound was coming from that direction.
Q When you turned to your right, did you see anything?
A Yes, I saw a van and a red vehicle parked next to each other. And people diving on the sidewalk in front of Rite Aid to the ground.
Q You indicated that you saw a red vehicle. Can you use the laser pointer and show the Jury where you saw the red vehicle?
A Um --- the red vehicle was approximately here (indicating).
The van was to its left and slightly forward.
Q When you say 'here', you're indicated out in front of
[Page 113]
the Rite Aid in the driveway (indicating)?
A Yes, in front of the entrance there.
Q What direction was the red car facing?
A Both the vehicles were facing to the south.
Q Which would be towards the Art Van Store?
A Correct.
Q And, where is the Art Van Store?
A This is the side they were pointing (indicating), the furniture store.
Q Were you able to get an idea as to how close the vehicles were to each other, the passenger's side on the van in relation to the driver's side on the red car?
A I would say approximately five to six feet?

Q Now, obviously that's an estimate on your part, it is not that you got out and measured, correct?
A Right.
Q When you looked to your right and saw this, was there anything obstructing your vision by way of cars, anything like that?
A No.
Q When you turned to your right, after hearing the gunshots, you indicated that you saw several people diving to the ground?
A Yes.
[Page 114]
Q Was there anything else that you saw in relation to people that were in the area?
A I guess I don't understand what your question is?
Q Do you recall whether or not you saw anybody standing outside the red car, at any point in time?
A Um --- there were two men to the right of the vehicle.
Q When you say 'right of the vehicle', what area are you talking about?
A In front of Rite Aid. They were traveling towards the direction of the Hallmark Store. One was moving faster than the other.

The second man who was a little slower took two-- took a few steps and plummeted to the ground.
Q What did you do, after looking in that direction?
A I dialed the Southfield Police Department.
Q Did you do that from your vehicle?
A Yes, I did. Exited the vehicle while I was doing that.
Q What happened next?
A One of my employees ran out of the front of my store. I told him to go inside and lock the door.

I ran to the scene of the shooting.
Q Prior to calling 9 1 1, did you watch the white van and red car?
A Yes, I did.

Q Did you see what the white van did after the shots?

[Page 114]

ended?

A Um --- it pulled away, it pulled out onto Greenfield Road. Paused at the entrance to Greenfield and then proceeded southbound.

Q How long after the last shot was fired? How much time passed after the last shot was fired to when the van started moving and drove away?

A Approximately five seconds.

Q And, what was the manner in which the van drove away? I mean by that I am referring to did it burn rubber, did it go slow, how did it drive out of the lot?

A Slowly.

Q And, you indicated when it got to Greenfield it actually stopped before going out on to Greenfield?

A Yes, it did.

Q Now, did you make that observation while you were still in your truck?

A No, I was on the in the parking lot at that time talking to the dispatcher giving a description of the vehicle.

Q Did you describe to them what it was that you saw?

A It was a full-sized Chevy or GMC customized type van with a grey or blue band around the side.

Q And, you relayed that information to the dispatcher?

A Yes.

* * *

[Page 124]

[Q by Mr. Bilkovic; A by Haywood Graves]

Q When you parked your vehicle, what direction was the front of your vehicle facing?

A Towards the store.

Q What were the lighting conditions like in the parking lot that evening?
A Um --- it was dark, so it was fairly well lit by the parking lot light.
Q And, what was the weather like?
A Well, it was fair.
Q Let me ask you this
A (Interposing) There was snow on the ground.
Q Was it snowing, or raining, or ---
A (Interposing) No. No.
Q (Continuing)...anything like that though?
A No.
Q When you got out of your car, where did you go?
A I went straight to the store. I went straight up the Rite Aid Pharmacy.
Q And, you obviously then crossed across the parking lot?
A Yes.
Q And, did anything occur as you were doing that?
A Yes. The van was coming down this strip (indicating).
Q There is a laser pointer up there, if you want to use the laser pointer it is there next to you.

Talking about the diagram, if you could just
[Page 125]
tell the Jury what area you are at?
A Okay.
Q And what area you saw?
A Okay.

As I said, I parked here (indicating). I was going straight across here (indicating). As I was going across the van was coming from this direction (indicating).

Moving fast, and I jogged across the street and stepped up onto the curb.
Q Why did you do that?
A Because the van was going pretty fast.
Q As you did that, did you notice any other cars in the area?

A Yes.
Q What did you notice?
A A red ---
Q (Interposing) Use the laser pointer again, as well.
A It was a red Chevrolet.
Q At the Rite Aid?
A Right here in the strip (indicating), not in one of the stalls right there.
Q What direction was that vehicle facing?
A It was also --- it was facing this way (indicating).
Q Facing towards the Art Van?
[Page 126]
A Right.
Q And, could you tell whether or not there were any occupants inside that red vehicle?
A Yes. Two young gentlemen.
Q Could you tell whether or not the red vehicle was running?
A Yes, it was running.
Q Was not moving at all?
A No.
Q Did you cross in front of that vehicle?
A Yes.
Q As you were crossing --- as you were going across the parking lot and you see the red van coming at you, or coming in your direction, what happened?
A A voice came from the van saying, 'What you saw Big Dog?'
Q Where were you at when you heard this voice?
A I had just stepped up on the curb.
Q So, could you use the laser pointer and just show the Jury where you were when you heard the voice?
A Right here (indicating).
Q You had just stepped up onto the curb?
A Um-hum.
Q Is that a 'yes'?
A Yes.
[Page 127]

Q So, you heard the voice --- or, when you heard a voice say, 'What's up Big Dog?' could you tell where that voice was coming from?
A Yes, it was coming from the van, the passenger's side of the van.
Q Where was the van at this point?
A The van --- the van was parked --- it was about directly at the doors, right behind me.
Q Where was the van in relation to the red car?
A Um --- coming right up on it. It was still moving, but it wasn't moving as fast anymore.
Q When you heard 'What's up Big Dog?' did the van stop?

If you know?
A No, I don't know.
Q The voice tone of the 'What's up Dog?' What did that sound like to you?
A It was a threatening tone, it wasn't like a home boy type tone.
Q Did it cause you some concern?
A Oh, yeah.
Q So, what did you do?
.A I went directly into the Rite Aid.
Q Were you ever able to see if that van came to a stop?
A Yes. I saw it stop right just --- just ahead of the car.
[Page 128]
Q Just ahead of the red car?
A Yes.
Q And, approximately how many feet from the red car was it, could you tell by that?

I mean, the passenger's side of the van, the passenger door in relationship to the driver's door on the Baretta --- on the red car?
A Actually the windows were just about lined up.
Q Fairly close to each other?
A Yes.

Q Now, you indicated you kept on walking?
A Um-hum.
Q Is that a 'yes'?
A Yes.
Q I'm sorry, I had to do that for the Court Reporter.
A I understand, yeah.
Q Where did you go?
A I went into the Rite Aid. As I stepped just beyond the second set of closed doors
Q (Interposing) Let me stop you for a second.
When you go into the Rite Aid, did you have to open up a set of doors?
A The doors open up automatically.
Q And, you went through those doors?
A Um-hum.
[Page 129]
Q Is that a 'yes'?
A Yes.
Q And, how many feet do you have to walk until you get to the second doors?
A Oh, I would say approximately ten (10) to twelve (12) feet.
Q And, when you got to those second set of doors, are you running at this time, or are you walking?
A I'm still walking.
Q What happens next?
A I heard the gunshots go off.
Q How many gunshots did you hear?
A It was approximately five to six.
Q Could you tell what direction they were coming from?
A No, I couldn't.
Q Could you tell whether they were coming from outside of the Rite Aid versus inside the Rite Aid.
A Oh, yes. I could tell it was coming from outside the Rite Aid.
Q So then what did you do?

A I continued walking --- walking back toward the rear of the store.

Q Okay.

And, what did you do when you got to the rear of the store?

* * *

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[Q by Mr. Bilkovic; A by Haywood Graves]

A No.

Q How much time passed between you hearing, 'What's up Big Dog?' and the first shots being fired?

A I would say in the area of ten (10) seconds.

Q Would it be fair to say that it was not instantly, you didn't hear 'What's up Big Dog?' boom?

A No.

Q Are you sure about that?

A Yes.

The reason I am sure is because it gave me time to --- like I said, I was at the curb when I heard it and I had those few seconds to walk into the second door of the Rite Aid.

Q And, as you were walking into the Rite Aid, were you thinking about that statement, 'What's up Big Dog?'

A Yes.

Q Why was that?

A Because of the tone, it was the --- the comment came.

Q Do you know who that comment was directed at?

A No.

Q Did you have some concern it might have been directed at you?

A Yes.

Q Now, when you first saw this van, how would you describe

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the speed?

A I would describe it somewhere in the area of seventeen (17) to twenty-six (26) miles an hour.
Q I have never heard anybody estimate seventeen (17) to twenty-six (26) miles an hour before.
A Well, I'm a driver, so I can basically generalize.
Q Did you have an impression, or do you have any impressions today, thinking back on it whether or not in your opinion that was slower or faster than what you normally find in a parking lot?
A It was fast. It was much too fast for that parking lot, and it is only a two lane area.
Q And, do you recall a more specific description of the van?
A Just that it was white with a stripes on the side. The rims were --- um --- after market.
Q Explain the after market?
A Expensive type rims that you would buy at a specialty shop?
Q What color were they, do you know?
A They were gold.
Q Are you familiar with the term 'Dayton Rims'?
A Yes.
Q And, were the rims that you saw consistent with what are commonly referred to as Dayton Rims?
[Page 135]
A Yes, they were Dayton's with the bullet center.

MR. BILKOVIC: May I have a moment, your Honor?

THE COURT: You may.

(Whereupon a brief delay was had.)

* * * [in original transcript]

Q (By Mr. Bilkovic, continuing) I am showing you what has been marked People's proposed Exhibit 5 (indicating).

Do you recognize this?
A Yes.
Q And, what is this appear to be to you?
A It appears to be the same van.

Q The same van that you saw in the parking lot that night?
A Yes.
Q And, is there any difference between this van and the van you saw in the parking lot on January 10th of 2000?
A The rims are gone.

MR. BILKOVIC: Your Honor, at this time I would move for admission into evidence People's proposed Exhibit Number 5.

THE COURT: Exhibit 5 may be admitted into evidence.

Q (By Mr. Bilkovic, continuing) That appears to be a photograph of the van that you saw?

* * *

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[Q by Mr. O'Meara, A by Mr. Graves]
[Q by Mr. O'Meara continuing] attention to it other than to hurry up and get across the street so you don't get hit, right?
A That's correct.
Q You --- I kept hearing the phrase, 'What's up Big Dog.' But it is really true, isn't it that what you heard, what you told the police you heard was, 'What did you say, Big Dog?'
A Right.
Q That's what you heard from behind you as you passed onto the sidewalk toward the Rite Aid, is that correct?
A Correct.
Q And, that's the phrase what you --- what --- I think the way you put it was, 'What you say Big Dog?'
A Correct.
Q Um --- that was said in such a manner that caused you to want to get off the street and into Rite Aid?
A Right.

Q And, you weren't turning around --- now you were thirty-seven (37) at the time and you aren't interested in getting into any sort of a beef on the street, even if somebody wants to get into a beef with you, correct?
A Right.
Q So, even if that was directed to you, is it fair to say that your response still would have been to just go on to Rite Aid and take care of your business?

* * *

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[Q by Mr. Bilkovic; A by Charles Rube]
A Yes, it is.
Q And, you indicated that did you drive there in a vehicle?
A Yes, I did.
Q Did you park your vehicle in the parking lot?
A Yes.
Q Do you recall if it was parked next to anything?
A Yes, it was ---
Q (Interposing) I want to make it easy for you, I just want to know if you recall?
A Okay.
Q I am going to give you an 'R', if you could step down here and simply place the 'R' in the parking spot where you parked your vehicle?
A (Indicating).
Q Now, there is a laser pointer right there (indicating).

I would have you refer to the diagram if you could just use that pointer to show the locations that you are talking about.

Were you with anybody or were you by yourself?
A I was by myself.
Q And, what direction was your vehicle facing?
A My vehicle was facing Greenfield.
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Q What type of vehicle was it?
A It was a Mazda Miata.
Q And that's a convertible?
A Yes, it was.
Q January 10th, top up or down?
A The top was up.
Q Now, you indicated that you went into the Rite Aid Pharmacy?
A Correct.
Q How long were you inside the Rite Aid Pharmacy?
A Ten (10) minutes, maybe.
Q When you came outside the Rite Aid Pharmacy, did you begin to walk to your vehicle?
A Yes, I did.
Q Did you notice anything at that point?
A Yes. As I reached the curb of the pharmacy, I looked before crossing and I noticed two cars --- I should –a car and a van farther down the mall. And I noticed them.
Q Down in what direction?
A Um ---
Q (Interposing) If you could use the laser pointer.
A Around there (indicating).
Q Down in the area of Lou's Deli?
A Correct.
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Q Okay.
What happened next?
A Um --- well, they were far enough down so it was safe for me to walk, they were approaching headed towards the Rite Aid.

But, as I --- like began to cross I noticed that they were continuing to drive forward and increasing --- increasingly fast headed straight towards me.
Q What did you do?
A Um --- I--- I hastened my pace and quickly crossed toward my car.
Q Did you get in your vehicle?

A Yes, I did.
Q Did you see where these two vehicles that you had seen went?
A Pardon me?
Q The two vehicles that you had seen coming in your direction.

Well, if you did, I apologize. Did you indicate what types of vehicles they were?
A There was a small red car and a large white van.
Q The small red car, where was that traveling in relationship to the curb that steps up onto the store fronts?
[Page 149]
A That was closer to the curb, and the white van was next to it.
Q On the outside of it I guess, so to speak?
A Yes.
Q Did you ultimately see where those two vehicles -- well, then did those vehicles eventually stop some place?
A Yes. As I was crossing they continued to head straight towards me, and as I approached my car they stopped right next to each other behind my car.
Q And, could you please use the laser pointer to just indicate where it was that they stopped?
A Yes. They both --- one next to each other, right over here (indicating). Blocking me in.
Q And, were you able to see the white van at that point?
A Yes, it was right behind my car.
Q How far was the white van from the rear of your car?
A Maybe around four or five feet or so.
Q Were you able to see the red car there?
A No, the white van obscured the red car.
Q Did these vehicles come to a stop before or after you got into your car?
A They stopped before I got to my car.

Q What did you do?
A I was just kind of wondering what they were doing
[Page 150]
stopping right there and I slowly got into my car and I proceeded to wait, because they were blocking me in. And I was just kind of waiting for them to go, because I couldn't --- I couldn't move.
Q Prior to getting into your car, were you able to tell whether --- how many occupants were in the van?
A No, I was not. I only saw one the driver.
Q Were you able to get a description of that individual?
A No, it was very briefly.
Q By a description you can't tell us whether it was male, female, anything, correct?
A No.
Q Did you see anything that that driver did while you were outside your vehicle?
A As I was by my car and about to get in the only thing I saw was the driver turn to lean towards the car.
Q In towards the van you mean?
A In towards his van, yeah.
Q Could you tell the direction he turned?
A Just away from the window into the van. So I couldn't see him any longer.
Q You could no longer see him.
A Until I could no longer see him.
Q Is it fair to say that you don't know where he went in that vehicle?
[Page 151]
A Correct.
Q What happened at that point?
A At that point I got into my car and I was waiting because not only because I couldn't get out and they blocked me in, and I was almost going to honk to get them to notice but I just sat in my car and then all of a sudden I heard gunshots ring out, bang, bang, bang.
Q Could you tell how many gunshots it was?

A It was probably around five or so in succession.
Q Fair to say you weren't counting, it is just your recollection how many you heard, correct?
A I wasn't counting them, no.
Q Could you tell what direction they were coming in?
A No, I could not. I could tell that it was like behind me, but I ---
Q (Interposing) That's what I mean?
A Yeah. It was behind me, but I couldn't tell which direction they were from.
Q And, obviously you didn't see anybody with a gun, correct?
A Correct.
Q When you heard the gunshots, what did you do?
A I ducked.
Q Why did you do that?
A Because I didn't know where they were coming from and I
[Page 152]
was afraid where they might go.
Q What was going on through your mind at this point?
A I was just very concerned and scared as to --- I didn't know what was happening.
Q Was this a fairly traumatic incident for you?
A Yes.
Q How far apart were the shots, if you recall?
A It was pretty rapid.
Q after the shots stopped, what did you do?
A I sat there in my car and waited and then the white van drove off.
Q You said you sat there in your car and waited?
A Um-hum.
Q Did you sit up?
A I sat up somewhat and looked out the back of my window and the mirrors.
Q And, what did you see?

A I didn't see anything, I just saw the white van there.
Q That's what I meant --- that's what I am getting at. When you --- after the shots stopped?
A Yes.
Q You're down in your van?
A Um-hum.
Q You have to say --- is that a 'yes'?
A Correct.
[Page 153]
Q After a few seconds you kind of sit back up?
A Yes.
Q How many seconds had passed between the last shot and you sitting back up?
A Just maybe five, ten (10) seconds.
Q You gave yourself enough time to make sure that basically the coast was clear?
A Exactly.
Q And, after you did that, and you looked behind you, what did you see?
A Well, I saw the van drive off.
Q When you looked behind you at first, was the van still there?
A The van was still there. I didn't notice anything.
Q It had not begun to leave yet?
A Correct. It was still there.
Q You indicated that the van eventually did drive off?
A Yes.
Q How much time passed between the last shot and when you saw the van start to drive off?
A Maybe twenty (20) seconds, half a minute or so.
Q Estimate on your part?
A Yes.
Q Did you recall testifying in this case previously that -- and I am not saying that you're wrong, I am just
[Page 154]
trying to show the consistence.

Do you recall testifying previously somewhere ten (10) to fifteen (15) seconds.

A Yes.

Q In any event, are you confident that the van did not drive off the moment that the shots stopped firing?

A Correct. Yes. There was a pause, a short time period.

Q What direction did you see the van go?

A The van continued --- the van continued driving off around the corner this way (indicating).

Q Towards the Art Van?

A Correct.

Q How did the van drive off?

A It drove off at a normal pace. It did not like peel out of there or anything.

Q How did it drive off in relation to how it was driving when you first saw it coming in your direction when you were coming out of the Rite Aid?

A Well, when they were coming down they were driving very quickly. Like they were racing almost, when they were driving towards me.

And, then when it left it just left at a normal pace.

Q After the van drove off, were you able to see any other

* * *

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[Q by Mr. Bilkovic; A by Dr. Beernardino Pacris]

THE COURT REPORTER: I'm sorry sir?

THE WITNESS: One hundred twenty-six (126) pounds.

Q (By Mr. Bilkovic, continuing) When you had an opportunity to perform your autopsy on Mr. Morris on January 11th, did you notice whether or not he had undergone any surgical procedures?

A Uh --- Mr. Morris had some therapeutic maneuvers done. There was an endotracheal tube, or gastric tubes in the intravascular lines.

And he underwent exploratory laparotomy, that is that there is a surgical incision.

Also a surgical incision on the front chest and a vertical surgical incision in the abdomen.

Q Was that in relation to what had happened to him?

A Before --- after the incident Mr. Morris was brought to Providence Hospital and he was operated on.

Q When you were examining Mr. Morris' body, did you notice any external injuries?

A Yes. Mr. Morris had a bullet wound, gunshot wounds.

Q I will get to the internal aspect of the gunshot wounds later, but I want to talk to the Jury about the external injuries that you saw with respect to those gunshots wound, where they were located?

A Mr. Morris got an entrance wound on the left side of the

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abdomen (indicating).

Q The area where you are pointing to right now?

A Yes.

Q Can you stand up just briefly and show the Jury?

A (Indicating). He had an entrance wound on the left side of the abdomen, the bullet perforates the skin, enters the abdominal cavity.

It perforates the ---

Q (Interposing) Doctor, I don't mean to interrupt you, I will get to the internal aspects later. I am just going to talk about the external later.

You can sit back down.

A Entrance on the left side of the abdomen and exits on the front of the right chest (indicating).

Q The area where you are pointing to?

A That's correct.

There is an entrance wound on the ---

Q (Interposing) Let me stop you for one second. You are talking about exit and entrance wounds. You indicated that the entrance wound is to the left side of the chest and the exit wound was under the right area of the chest.

How is it that you, as a forensic pathologist, are able to tell the difference between an entrance wound and an exit wound?

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A An entrance wound usually --- if it is a close range it is pretty easy. We see some soot, or gunpowder stippling, which indicates it is an entrance wound.

But, if it is a long range we usually depend on the character of the entrance wound. Usually when we approximate the ages of the wound margins we cannot approximate because there is a defect, and say the bullet separates the skin.

And, usually when the bullet separates the skin it leaves a concentric or eccentric abrasion, collar ring which we doesn't see in an exit wound.

In an exit wound it is just where you got stipple like. And, if we approximate the largeness of the exit wound there is no difference that we can see.

Q In using those principles, is that how you were able to determine that the entrance wound was to the left side and the exit wound was to the right side?

A Yes.

Q Did you notice any other signs of external injury to Mr. Morris?

A There is an entrance wound on the left buttock, and this bullet exits on the pubic area.

Q Any other injuries external?

A There is an entrance wound on the left side of the left thigh, and exits on the front of the left thigh.

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Q Any other wounds?

A The fourth wound is also on the left thigh. The entrance wound is on the left thigh and I recovered a bullet that is a large copper-jacketed bullet on the medial aspect. It fractures the left femur.

And I located a bullet on the medial aspect on the left side.

Q So, there was no exit wound with respect to that?

A That's right. It's a penetrating gunshot wound.

Q Can you briefly stand up and just show the Jury and describe two entrance wounds on the left thigh. Can you just briefly stand up and show the Jury where those entrance wounds were located?

A (Indicating) Entrance here on the left side (indicating), exits on the front of the leg (indicating).

As the bullet enters the left side of the thigh, and I recovered the bullet from the medial aspect (indicating) of the left thigh.

Q Any other wounds that you noticed externally?

A There is a grazing bullet wound in the left pinky (indicating), and the left ring finger (indicating).

Q When you say grazing wound, what do you mean by that?

A Grazing wound means that the bullet just swipes the skin and the epidermal layers of the fingers.

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Q What does that do, visible injury to cause to the left hand?

A Say that again?

Q Does it leave any marks of a physical injury in the left hand?

A Yes, I did some --- it left a mark of grazing wounds.

Q What type of wounds?

A It is just like a laceration and displaying of the epidermis and the dermis area.

Q Now, you indicated that you also performed an internal examination?

A That's correct.

Q With respect to the wound, the entrance wound to the left side of the chest that exit on the right --- I'm sorry, left side of the abdomen that exited on the right side of the chest.

Could you tell the Jury what it is that you found with respect to that during your internal examination?

A When I did the internal examination it is basically looking for the hemmoratic pathway what the bullet injures so it can help me detect my trajectory.

This bullet in the left side of the abdomen enters the abdominal cavity and hits the upper pole of the left kidney.

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After hitting the upper pole of the left kidney hits the mesentery of the small intestine. It perforates the liver, that is the left lobe of the liver, and then it perforates the diaphragm.

The diaphragm is the muscle separating our abdominal organs and the thoracic organs after it perforates the diaphragm going into the chest cavity.

It perforates the right lobe --- the middle lobe of the right lung, and grazes the heart which is the right valve ventricle and exits on the front chest, just below the right nipple.

Q Was there any bone damage to Mr. France as a result of that?

A It hits one of the ribs on the front or chest. I didn't--- it was the third anterior rib.

Q What was the significance of those injuries, those internal injuries, in relation to what ultimately happened to Mr. Morris?

A Basing on those injuries, the trajectories, left to right, back to front and upward, and I saw some residual one hundred (100) mills of blood in each chest cavity.

But, please bear in mind Mr. Morris was operated, so there must be some more blood recovered in the hospital that they took out.

Q With respect to the injuries that you described, you

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described one as a grazing of the heart. What was the significance of this bullet grazing his heart?

A It is pretty significant, once you injure the heart, as we know, the heart is pumping every minute and since the heart is injured there is a great perponsity that Mr. Morris is going loose a lot of blood.

Q What about with respect to the injury to the liver?

A Injury to the liver, it is not that fatal compared to injury to the heart.

Well, of course, if that injury is not taken care of Mr. Morris can also die of exsanguination, but it would take more time compared to the injury of the heart.

Q Do you have an opinion as to whether or not those injuries that he sustained as a result of that wound were fatal?

A It is a combination of both. You know, Mr. Morris is loosing a lot of blood and you've got an injury from the liver, kidney, heart and lungs looks fatal to me.

Q With respect to the other injuries that you saw, would you explain the internal damage that you saw on those?

A The injury on the left bottom, which is in the left buttock, injured the urinary bladder.

The urinary bladder is the organ which usually the urine goes. After injuring the urinary bladder it

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went out to the pubic area.

So, again, the trajectory is back to front, --- back to front, left to right and upward.

Q What about the other injuries?

A The two injuries in the left thigh, the one was a through and through. It went to the left side of the thigh and exited on the front of the left thigh.

So, it is left to right, slightly back to front and downward.

And the other one was the penetrating gunshot wounds to the left thigh again. Went to the left side of the thigh and I recovered fractures the femoral bone, and I recovered a large caliber of bullet on the medial aspect of the left thigh.

Q Could you stand up and show the Jury the area that you are pointing?

A (Indicating) Getting old.

Here (indicating).

Q You indicated that it fractured the femur?

A That's correct.

Q And, where is the femur on your body

A The femur is the longest bone in our body and it connects the hip and the lower leg, so it is a pretty long bone.

Q Doctor, I am handing you two proposed Exhibits [Page 177]
(indicating). The first one is marked People's proposed Exhibit 6.

The second one, marked People's proposed Exhibit 7. Do you recognize those (indicating)?

A Yes, I do.

Q Starting with People's proposed Exhibit 6, what is that?

A This is the x-ray that I did in the leg, it depicts a fractured femoral bone and the location of the bullet.

In cases of multiple gunshot wounds, in order not to miss any trace evidence I usually do a complete x-ray of the body.

And, this is the only bullet that I found in the body.

Q With respect to People's proposed Exhibit 7, what is that (indicating)?

A This is the bullet I recovered from the left thigh of Mr. Morris.

Q And, what did you do with that bullet after you recovered it?

A Usually we have a chain of custody and the Officer who is going to pick this up usually signs the chain of custody. So, I gave it to the Officer-in-Charge.

Q Doctor, when you were describing earlier to the heart, you used the word, and I am not familiar with it. You indicated that there was exanguation of the blood? [Page 178],

A That's correct.

Q What does that mean?

A Exanguation just means a massive hemorrhoids at the maganisian of death. That is caused by multiple gunshot wound, and the maganisian of death is usually due to acute blood loss or exanguration.

MR. BILKOVIC: Your Honor, at this time I would move for admission into evidence of People's proposed Exhibit 7.

MR. O'MEARA: I have no objection.

THE COURT: Exhibit 7 may be admitted into evidence.

MR. BILKOVIC: Six as well, your Honor?

MR. O'MEARA: No objection.

MR. BILKOVIC: Thank you.

THE COURT: And six may be admitted into evidence.

MR. BILKOVIC: Thank you.

Q (By Mr. Bilkovic, continuing) And, Doctor, after performing your autopsy and reviewing the appropriate photographs and initial documentation in this case, did you have an opinion of the cause of death of Mr. Morris?

A Yes, I did.

Q And, what is that opinion?

A Mr. Morris died of multiple gunshot wounds, and the

* * *

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[Q by Mr. O'Meara; A by Dr. Beernardino Pacris]
[A continuing] and I shoot you, hypothetically if I just stand here and go ahead shoot me, it will be relatively straight. But, then again, if I duck (indicating), it will go downward.

So, hypothetically the trajectory of the bullet depends on the position of Mr. Morris when he was shot. If he was shot in the van and he moved like this (indicating), trying to get out of the door naturally the trajectory of the bullet could have been in an upward fashion.

Q Exactly, it would be your --- in your example you just used would be Mr. Morris lunging away from --- if you are sitting in the driver's side, it's hypothetically and you don't know this, I don't think, from your own personal experience, but if he was sitting in the driver's seat of car, it would be --- that wound would be consistent with him lunging toward the other side of the car and being shot through that window from a downward angle, correct?

A That's correct.

Q Correct?

Moving away from the area from which the shots were coming, correct?

A It could be consistent.

Q All right.

And, the rest of the shots, the shots that hit

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him in the leg and the hand, the shots in the leg are consistent with a downward trajectory, correct?

A One shot was in a downward fashion.

Q And the movement of the hand, of course your hand could be anywhere, so anything can happen with your hands?

A Yes.

MR. O'MEARA: Thank you very much, Doctor.

THE COURT: Anything further?

MR. BILKOVIC: Yes, your Honor.

REDIRECT EXAMINATION
BY MR. BILKOVIC?

Q Doctor, one hypothetical that you were given has to do with Mr. Morris being in the car and trying to get out of the car, correct?

A Correct.

Q Is it possible or can you rule out that he was shot when he was outside of the car and was falling to the ground?

A That's also a possibility.

I wasn't there, so I don't know. Again, I cannot detect the exact position of Mr. Morris. There is a lot of possibility. And, as I said before, when we are shot we don't stand still. We try to run away, or whatever.

Q One of the wounds to the leg did not have the upper trajectory, is that correct?

* * *

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[Q by Mr. Bilkovic; A by Frederick France]

A Yes, sir.

Q And, when you were driving with Sam, do you know whether Sam had his lights on or not?

A Yeah, it was night time.

Q It was night time?

A Yes.

Q Believe it or not, there is people that don't drive with their lights on at night?

A Yeah, he had them on.

Q You're sure he had them on?

A Yes.

Q When he had them on, was there any other lighting in the area that you noticed?

A You mean the parking lot?

Q Yes?

A Parking lights.

Q And ---

A (Interposing) And the stores, you know, up under all that sidewalks there is light under there. Lights in the parking lot.
Q So, how would you describe the lighting conditions in the parking lot that night?
A Light enough to see. A well lit parking lot.
Q Are you familiar with Lou's Deli?
A Yes.
[Page 197]
Q And, where do you see Lou's Deli on there?
A Right there (indicating).
Q And, when you were driving through the parking lot, did you and Samuel Morris come to Lou's Deli?
A Yes, sir.
Q And, as you approached Lou's Deli, did something happen?
A Yeah. Well, when we were coming up I saw some guys coming out of Lou's Deli.
Q Approximately how many guys did you see?
A About four or five.
Q And, at that time when you first saw them coming out, anything significant about them, when you first saw them?
A When I first saw them?
A Yes.
Q No, just some guys coming out of Lou's Deli?
Q Did you notice if all four or five were together or no?
A I assumed they all walking out the door at the same time.
Q And, what did Mr. Morris do when these individuals were walking out of Lou's Deli?
A Well, when we were coming up they were like coming walking out, they come up the sidewalk. So he stopped to let them walk in front of him.
Q I want you to step down and take this 'B' and put it on
[Page 198]

People's Exhibit 4, to show the area where the Baretta was stopped (indicating).

A (Indicating.)

Q When Mr. Morris stopped the Baretta, how far were these individuals away from the Baretta?

A Maybe five feet, four feet. About four or five feet, something like that, in front of the car.

Q And, which way did they walk?

A They walked in front of the car, and around the driver's side.

Q Did you notice anything about the individuals?

A Yeah.

Well, when they got like directly in front of the car one of them began staring at us.

Q Now I am going to talk about that person in a second.

Did you happen to see the relative size of these individuals?

A Yes.

Q Were there any people there that you would characterize as short?

A Yeah.

Q Approximately how tall was this person, I say the person you characterize as short, approximately how tall do you think that person was?

A Maybe five-seven, five-eight.

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[Q by Mr. Bilkovic; A by Frederick France]

Q In any event, shorter than the other people that were there?

A Yeah.

Q And, the person that you described as short, what was their facial features like?

A Chubby.

Q Chubby face?

A Yeah. Chubby body.

Q Chubby face and a chubby body?

A Yeah.

Q Now, you indicated that somebody else started staring at you?
A Yes.
Q Where was this person at when he started staring at you?
A In front of the car.
Q Approximately how far from you?
A I would say maybe four to five from the car.
Q If you were looking at the person, was the person looking back in your direction?
A Yes.
Q Were you looking directly out the windshield?
A Yes.
Q You are sitting in the car where you are right now, where would I be in relation to the person that was staring back at you, keeping your decision?
[Page 200]
A You would be right there (indicating). You started over a little and you would be walking in front of me and I watched as you walk to the left.
Q Distance wise, is that about accurate (indicating), where you were standing --- or you were sitting?
A (No verbal response.)
Q And, if not, move me, tell me where to go?
A That's probably about right, considering there was the hood of a car right there, that's probably about right.
Q Okay.
So, this distance between you and I (indicating)?
A Yeah.
Q Anything blocking your vision?
A No.
Q Now, you indicated that this person was staring at you?
A Yes.
Q Was there something about the stare that attracted your attention?

A It wasn't a stare like, you know, like 'Hey, how you doing?' It was a stare like he was mad or had some type of problem with it.

Q Was it a stare like, 'Thanks for letting me cross in front of you. '?

A No.

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Q What did you do?

A I just watched him. I just stared back at him.

Q Did the person slow down when they were walking, or did they just keep on walking?

A I wouldn't say --- I wouldn't say necessarily slowed down, but kind of like staring at us as he passed us. And as he passed us he looked into the driver's side window staring at us. And, when ---

Q (Interposing) Let me stop you for a second.

When the person was directly in front of your car staring at you and you were staring back at them, did you get a good look at that person?

A Yes.

Q You indicated that Mr. Morris' headlights were on?

A Yes.

Q Did you have any problems seeing this person at all?

A No.

Q If you saw that person again, would you be able to recognize him?

A Yes.

Q Do you see that person in court today?

A Yes.

Q Please point to him and tell me what he is wearing?

A Cream colored shirt, the Defendant (indicating).

MR. BILKOVIC: Your Honor, may the record

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reflect the identification of the Defendant, Van Thompkins.

THE COURT: It may so indicate.

Q **(By Mr. Bilkovic, continuing)** Now, you indicated that the Defendant kept on walking?

A Yes.

Q What direction did the Defendant walk?

A (No verbal response.)

Q You can use the laser pointer, if you want.

A Like --- if he came out right there (indicating), he walked around our car and proceeded back.

Q So, did he walk along the driver's side of your car?

A Yes.

Q From the front of the car to the rear of the car?

A Yes.

Q What direction was he looking?

A At us the whole time. Even when he got beside the car he was looking at us. And, then when he got behind the car he turned around backwards and was still staring at us.

Q What were you doing?

A Staring at him.

Q Why were you staring at him?

A Wondering what he was staring at us for.

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Q Had you done anything, or Mr. Morris done anything that you thought 'Maybe we did something wrong to this guy?

A No.

Q You indicated that he started walking backwards?

A Yes.

Q Did you continue to watch him as he walked backwards?

A Yes.

Q How far did he go backwards?

A Until maybe he was about six feet, six, seven feet away from their vehicle.

Q How far away from your car?

A Guessing.

Q Yes, estimate.

A Maybe thirty (30), thirty-five (35) feet.
Q Thirty (30) to thirty-five (35) feet?
A Yes.
Q Okay.
If you could, take the laser pointer and point to the area as to how far back he walked backwards?
A To about --- about right there (indicating).
Q Right over here to where the 'S' is?
A Yes.
Q And, is it fair to say it is an estimate on your part?
A Yes .
Q Did the Defendant continue to walk backwards the entire
[Page 204]
way?
A After he got behind me he just walked backwards and just kept staring at us.
Q And, did you continue to stare at him?
A Yes.
Q Now, were you still seated in the car?
A At that point, yes, until he got close --- close to his video --- um --- vehicle.
Q What type of vehicle did he get close to?
A A white and blue van gold rims on it.
Q Are you familiar with the term Dayton Rims?
A Yes.
Q And, did the vehicle have Dayton Rims on it?
A Yes.
Q Would you take the laser pointer and show the Jury where the van was parked?
A About right there (indicating).
Q Right over by the 'S' area?
A Yes.
Q Now, can you tell, exactly, looking at this diagram what space it was parked in?
A No, I can't tell you exactly the exact space.
Q Over in that area, though?
A Yes.

Q What direction was the van facing?
[Page 205]
A East.
Q And, which way would be east?
A Like it the ---
Q (Interposing) If I was sitting in the van --
A (Interposing) The head --- the rear of the van would be facing the stores.
Q The rear of the van would be facing the stores?
A Yes.
Q The front of the van would be facing Greenfield?
A Yes.
Q Could you see around to the driver's side?
A No.
Q Did you have a view of the passenger's side of the van?
A Yes.
Q When the Defendant --- you indicated that he got to about six to seven feet from the van?
A Yeah.
Q What happened then?
A Well, that's when me and Sam stood out the car and I was like, 'What you all looking at?'
Q Did you yell that?
A Yeah.
Q Yell it loud enough for people in the area to hear you?
A Loud enough for him to hear me, yes.
Q When you yelled that, did you see any people other than
[Page 206]
--- other than the Defendant over by the van?
A Yeah.
Q How many people did you see?
A I think it was about four, five, somewhere in that area.
Q Were you paying attention to these people?

A Well, they was all together. You know, my focus was pretty much on all of them. But, the main reason was because the Defendant, you know, was staring at us.
Q And, you indicated that you got out of the car?
A Yes.
Q Did you walk towards them?
A No.
Q Did Sam walk towards them?
A No.
Q So, what did you do when you got out of the car?
A Just stood up and asked what they were looking at.
Q Did anyone respond?
A One of them asked back. They said, 'What the F you all looking at?
Q Did they say F, or did they use the actual word?
A They said, 'What the fuck you looking at.'
'What the fuck you all looking at. '
Q Could you tell who it was that said that?
A No.
Q Any event, you are fairly certain that somebody in that
[Page 207]
group said it?
A Yes, positive.
Q Okay.
What happened after that?
A Well, after that, after they said that me and Sam just looked at each other. We just like, you know, forget it. It ain't no big deal. We got back in the car.
Q Did you have any concerns at that point?
A Not---not necessarily.
Q So, what happened?
A Well, we got back in and, I don't know, we started laughing about something. Probably --- I don't know what we said, but it was probably about them, like you know, 'What's wrong with them guys.'

We started laughing about it and proceeded to drive away.

A Sam started driving away?

Q Sam started driving away?

A Yes.

Q What happened next?

A Well, what happened next?

A Well, you know, as we were

Q Well, you know what, I am going to stop you for a second.

Did you see anybody get inside the van?

* * *

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[Q by Mr. Bilkovic; A by Frederick France]

A No.

Q At any point in time did you see the Defendant walk around to the driver's side?

A No.

Q And, you indicated you got in your car and started driving off?

A Yes, sir.

Q What happened next?

A Well, as we were going south in the parking lot, well -- like his window was busted out. And I don't think the radio was on, because if it was it was real low.

I heard a van like revving up, like a little tire squeaks and like an engine revving up, coming up towards us fast.

Q What direction was this noise from?

A It was behind us.

Q Did you look in that direction?

A Yeah.

Q What did you see?

A When I looked over I could see the van pulled up next to us.

Q Did Mr. Morris eventually stop his vehicle?

A Yes. I guess he looked over too and seen them pulling up on us and he hit the brakes.
Q And, do you recall where he was when he hit the brakes?
[Page 210]
A About right here (indicating). Right in front of that little pay phone.
Q In front of the Rite Aid?
A Yeah.
Q About right there (indicating), that little strip right there (indicating)?

MR. BILKOVIC: May I have a moment, your Honor.

THE COURT: You may.

(Whereupon a brief delay was had.)

* * * [in original transcript]

Q (By Mr. Bilkovic, continuing) I am going to have you step down again and just place this 'B' where Mr. Morris stopped the car.
A (Indicating).
Q What happened after that?
A When --- as I looked over the van was pulling up, so he hit the brakes, and I guess they probably --- whoever was driving the van wasn't expecting us to do that.

So, they passed us up by a little bit.
Q How far did they go past you?
A Maybe to where their side windows where the side doors was at was like where his drive window is at.
Q So, they went passed you far enough so that if you were
[Page 211]
looking out the passenger's --- the passenger's side door, driver's side window you would see their middle door?
A Yeah. Exactly.
Q Couple of feet a head of you, then?
A Yes, sir.
Q And, what happened next?

A The van backed up.
Q Where did the van back up to?
A Parallel with us. Like the driver's window and the passenger window like (snap) right side by side.
Q Would you take this 'V' and put it as to where the van stopped?
A (Indicating).
Q Now, could you tell at this point in time whether or not the van, the front passenger window was opened on the van?
A Yes.
Q Was it opened or closed?
A It was rolled down.
Q It was rolled down?
A Yeah, it was rolled down.
Q How far was the passenger door on the van, front seat passenger on the in relation to the driver's door on Mr. Morris' vehicle?

* * *

[Page 214]
[Q by Mr. Bilkovic; A by Frederick France]
A No. No, sir.
Q When you made this observation and looked into the van, did you recognize the person that was seated in the passenger's seat?
A It was the same person that was staring at us.
Q Do you see that person in court?
A Yes.
Q Who is it?
A That man, right there (indicating), the Defendant.
Q Any doubt in your mind?
A No, sir.
Q After the cars pull parallel to each other, what happened next?
A Um --- when he got even to each other I looked up, I looked at him, and then he said, 'What you say, Big

Dog?'
Q Who said that?
A The passenger.
Q The Defendant?
A Yes.
Q How did he say it?
A Like --- 'What you say Big Dog?'
Q Loud enough where you could hear it?
A Yeah.
Q What happened next?
A Well, after he say, 'What you say, Big Dog?' Like immediately, I seen him start pulling up a gun. Like - when he went like this (indicating), I seen the gun in his hand.
Q What direction did he pull his hand out from?
A Right off his side.
Q What happened next?
A He pointed at us --- well, I seen him pulling it out and starting to point it at us and that's when I started reaching for my door trying to get out the car.
Q When the Defendant reached his hand out, were you still looking at him?
A Yes.
Q Any doubt in your mind that it was that gentleman seated right there (indicating)?
A No.
Q Could you tell what type of gun it was?
A No.
Q Could you tell what is the difference between a revolver and a semi-automatic?
A Yes, I do.
Q The revolver has got the round cylinder that goes around?
A Yes.
Q Could you tell whether or not the gun was a revolver of
[Page 216]
semi-automatic?

A It was an automatic, or semi-automatic.
Q It was not a revolver?
A No, sir.
Q Could you tell what color it was?
A My mind, right now, today, the picture I get in my mind is a black gun.
Q Do you recall giving the police a description of the gun back on January 10th, or January 11th, 2000?
A Not of that, no.
Q Let me ask you this, do you remember telling the officers back then you thought the gun was black.
A Yeah. I'm sure about that.
Q And, now two years later, that is something while you say ---
A (Interposing) I think about it every day, you know. And when I picture it in my head, I see a black gun.
Q What did the Defendant do with the gun?
A Pointed it at us and shot us.
Q What direction was the gun shot?
A Into the driver's window.
The driver's side, our car, the Baretta.
Q Was the gun outside the van window?
A Yeah.
Q What did you do?
[Page 217]
A I reached for my door, and I turned and tried to exit the vehicle.
And as I was trying to get away, that's when I got shot.
Q Did you see what Sam did at that point?
A The only thing I remember, I don't actually remember hearing a gunshot. I remember him throwing his hands up in the area and that's kind of it.
Q You remember seeing him throw his hands up?
A Yeah. I don't know, I guess it was the first shot, and then after that I don't really happened inside the car.
Q Is that when you turned?

A Yes.
Q You indicated that you opened your door?
A Yes.
Q What did you do?
A I proceeded to get out the vehicle.
Q And, in what direction did you go?
A Towards the Rite Aid, because after my door was --- and I just --- the first thing I seen, so I walked on ahead.
Q Did you walk into Rite Aid, or were you running?
A Trying to run.
Q What happened?
A It seemed like every step I took --- like I take a hit. Bang, I'm shot. Take another step. Bang,
[Page 218]
I'm shot again. It is like every step I took I just thought a bullet hit him.
Q Do you know where it was that you got hit with the gunshot?
A In my --- well, at that point in time it felt like it was just in my legs.
Q Could you stand up and show the Jury where it was that you were hit, and if you have to you can step down to show it to them.
A Well, I got ---
MR. BILKOVIC: Watch your step.
THE WITNESS: Hum?
THE COURT: (Interposing) Watch your step after you step down.
THE WITNESS: I got one in the back.
MR. BILKOVIC: Turn around so the Jury can see.
THE WITNESS: (Indicating.)
I got one on the inside of the back of my leg
Q (By Mr. Bilkovic, continuing) I want you to start from the beginning, okay.
Step out away from the Jury.
A (Indicating).

Q And you have to speak loud because your back is turned,
[Page 219]
I want the Court Reporter to be able to hear you.
A All right.
Q Show the Jury where it was that you got hit?
A I got one right on the inside (indicating) of my left leg.

One directly in the back of my right leg (indicating) .

Another one in my hip (indicating).

And one in both of my cheeks.
Q So, a total of five shots?
A Yes.
Q Where were you at the first time you felt yourself hit at?
A Probably one foot in and one foot out of the car.
Q Where were you at, the last time you felt yourself get hit, if you were able to break it down like that.

If you're not, just tell me you can't.
A I was caught right outside. Every time I took a step it was like I was getting shot. So if I took five steps, every step I took I got shot.
Q Did you look behind you at all as you were running?
A No.
Q When you got into the Rite Aid, what happened then?
A Well, when I went in there, I know everybody outside --- inside heard the shooting and obviously seen the
[Page 220]
commotion. When I went in everyone in the store ran from me.
Q Ran away from you?
A Yes.
Q What did you do?
A I went back outside.

Q Did you yell for help or anything?
A Not in the store. Everybody ran away, the cashiers, everybody in the store just ran to the back of the store. There wasn't nobody to yell help to.
Q When you first ran into the store, did you say anything to anybody?
If you remember?
A No, I don't know. I didn't get a chance to say help, because as soon as they seen me coming in the door holding my leg they just took off turned around running.
Q So, then what happened?
A I went back outside to see about Sam.
Q When you went back outside, did you go out in the area where the Baretta was?
A Yeah.
Q Did you see the van?
A No.
Q Any idea where the van went?
A Well, in that parking lot, from the position where he

* * *

[Page 230]
[Q by Mr. Bilkovic; A by Frederick France]
Q (By Mr. Bilkovic, continuing) When you were in the hospital the next day, had you had a chance to, in a sense, calm down?
A Yes.
Q And, were you given pain medication and things like that?
A Yes, I was on IVs and everything else.
Q Were you conscious and alert though?
A Yes.
Q Do you recall being visited by two Detectives from the Southfield Police Department?
A Yes.
Q Where did they come visit you at?

A In my room at the hospital.
Q And, did they have anything with them?
A Pictures.
Q Did they tell you where the pictures were from?
A Yes.
Q Where did they tell you?
A From Rite Aid.
Well, no, I'm sorry, excuse me. Lou's Deli inside. The pictures actually of the inside of Lou's Deli.
Q Did they ask you anything with respect to the pictures?
A They asked me did I remember the person, could I ID the
[Page 231]
people, you know, that was driving that vehicle that night.
Q Did you tell them whether or not you thought you could?
A Yes. Yes, I told them I could.
Q Did they tell you, 'I want you to look at this picture, the guy that shot you is in this picture. '?
A No.
Q Did they tell you, 'The driver of the car is in this picture, tell us who the driver is?'
A No.
Q What did they tell you?
A They was like, 'These are some pictures of the guys who we believe that were around Lou's Deli at that time, the time, you know, at around the time you guys got shot.
Here's the picture, are these the guys who
shot you? And, if so, who are they?'
Q I will show you what has been marked as People's proposed Exhibit 9 (indicating).
Do you recognize that?
A Yes, sir.
Q What is that?
A The same picture they brought to the hospital.

Q That is just one of the pictures.

Now, you just indicated that you looked at several photographs, or did you only look at one?

[Page 232]

A No, I had several.

Q Okay.

Was that one of the ones that you looked at?

A Yes.

Q When you were shown that photograph, did you recognize anybody in that photograph?

A Yes.

Q Who did you recognize?

A The shooter, driver and one guy and someone must be with them.

Q You don't know that though?

A Well, yeah, I know he was with them.

Q Let's talk about the shooter.

What did you tell the police with respect to the shooter?

A What did I tell them?

Q Yes.

A I picked out the photograph. I showed him shooter, driver and passenger.

Q Which person did you point at and say, 'That's the shooter?'

A The first individual in the picture.

Q The first individual as you are looking at the photograph on the left hand side?

A Yes.

[Page 233]

Q How long after you looked at that photograph, how long did you have to take before you told them, 'That's the shooter. '

A I knew it when I looked at it.

Q Pardon me?

A I knew as soon as I looked at it.

Q Did you tell him that as soon as you looked at it?

A Yes.

Q Any doubt in your mind?
A No.
Q You indicated that you also saw the driver?
A Yeah.
Q Where is the driver in that photograph?
A In the center.
Q The middle person?
A Yeah, the middle person.
Q Is that the person that you described as being shorter and having a chubby face?
A Yes.
Q How long did it take you to tell the officers that that was the driver?
A No time. Soon as they showed me the pictures. I went through the, you know, that's the shooter (indicating), that's the driver (indicating), and he's with them (indicating) .
[Page 234]
Q When you did that, did you see any other photographs prior to that?
A No.
As far as the pictures I seen.
Q Had you seen any news broadcasts or anything like that?
A No, I didn't have a television in my room.
Q When the officers were showing you these photographs, before you looked at them, did you know whether or not the people had shot you, the Defendant, was going to be in there?
A No.
No. I didn't.
Q The person that is depicted Number One, which you identified as the shooter in that photograph, is that person in court today?
A The Defendant.
Q Van Thompkins?
A Yes, sir.
Q Any doubt in your mind?

A No.

MR. BILKOVIC: Your Honor, at this time I would move for admission into evidence People's Exhibit Number 9?

THE COURT: Any objection?

MR. O'MEARA: No objection.

[Page 235]

THE COURT: Exhibit Number 9 may be admitted into evidence.

MR. BILKOVIC: Counsel, would there be any objection to ten (10) as well?

MR. O'MEARA: No, no objection.

MR. BILKOVIC: Your Honor, I will show the Witness People's proposed Exhibit 10, and indicate that it is an enlargement of People's proposed Exhibit 9.

I would move for it's admission at this time. I don't believe there is any objection.

MR. O'MEARA: There is none.

THE COURT: Exhibit Number 10 may be admitted into evidence.

Q (By Mr. Bilkovic, continuing) The top photograph, People's Exhibit la, can you take the laser pointer, does that photograph does that blowup of People's Exhibit 9 that you are holding in your hand?

A Yes.

Q Is the person that you identified as the shooter, is he exhibited in that photograph?

And, I understand it is not as clear, but if -

A (Interposing) Yeah. That one right there (indicating), the first one.

Q That's the Defendant?

[Page 236]

A Yes, sir.

Q The person that you described as being shorter and having a chubby face and being the driver, is he in there as well?

A That's the guy in the middle, right there (indicating).

Q The person in the middle of the shot?
A Yes. Yes.
Q Do you see that person --- did you identify the driver anywhere else on those series of photographs?
A Yeah.
Right there holding the little food tray (indicating)
.Q In the middle of the bottom?
A In the middle of the bottom, yes, sir.
Q And that is the person you identified as the shorter person with the chubby face?
A Yes, sir.
Q And, that was the driver of the vehicle?
A Yes.
Q At any point in time did you see the driver of that vehicle with a gun?
A No.
Q Did you come to learn the identity or name of the person you identified as the driver?
A Yes.
[Page 237]
Q Do you recall what that name is?
A Van Chester Thompkins Jr.
Q I'm talking the driver?
A The driver. Oh, ---
Q (Interposing) If I mentioned a name ---
A (Interposing) Eric Purifoy.
Q Eric Purifoy?
A Yeah.
Q And, do you know whether or not Mr. Purifoy was charged as a result of this?
A No, he wasn't.
Q Do you know if he was charged?
A Yeah, he got charged, but he got found not guilty on having anything to do with this.
Q The murder?
A Yes.

Q Do you recall going to court on January 28th, of 2000, over two years ago and testifying at the Preliminary Examination of Eric Purifoy?
A Um-hum.
Q Is that a 'yes'?
A Yes, sir.
Q And, do you recall during that examination being asked questions by me and by Defense Counsel, for Mr. Purifoy?
A Um-hum.
[Page 238]
[Mr. France continuing] Yes.
Q Is that a 'yes'?
A Yes.
Q Do you recall whether or not you identified back on January 28th, 2000 who the driver of that vehicle was?
A Yes.
Q Who was that?
A Uh --- Purifoy.
Q Eric Purifoy?
A Yes, sir.
Q People's Exhibit 9, that you have up there, that photograph of those three individuals (indicating). Do you recall whether or not that was shown to you at the Preliminary Examination?
A Yeah. Yes, sir.
Q And, do you recall whether or not you identified --

MR. O'MEARA: Your Honor, for the first time I will object on the grounds of hearsay. He is testifying about statements he apparently made out of court, it's hearsay. Even though his own witness it is still hearsay.

MR. BILKOVIC: Your Honor, if I could respond briefly, I would respond with 801 D 1 C, that indicates:

'A statement is not hearsay if it is clear and is subject to cross-examination and the statement is
[Page 238]

one of identification of a person made after perceiving a person.'

I would also cite to the Court People versus Malone, 445 Michigan 369, 1994, in which the Michigan Supreme Court held:

'It is both proper for an officer that listens to the identification or the witness that made the identification based on a photo lineup to talk about that in later hearings as to their identification at any point in time. '

And I believe it is proper.

MR. O'MEARA: He is making his identification in court here today. It is redundant, unless I attack, and say he just made up this identification it is a prior consistent statement which is being offered to rebut a claim of fabrication which isn't being made.

MR. BILKOVIC: Your Honor, I would rely on People versus Malone, and I would quote from that case. The rule cannot be more clear. It does not matter if it is a third party or a person that actually made the identification.

'A person that makes a prior identification can subsequently testify, in court, about any prior identifications that that witness has made. '

THE COURT: You may receive an answer.

[Page 240]

THE WITNESS: Can you repeat the question, please?

Q (By Mr. Bilkovic, continuing) When you were in court, on January 28th, of 2000 and you were shown that photograph, did you identify the shooter of the vehicle?

A Yeah.

Q And, who did you identify?

A Van Chester Thompkins.

Q Is that ---

A (Interposing) The first person in the picture on the left side (indicating).

MR. BILKOVIC: May I have just a moment, your Honor?

THE COURT: You may.

(Whereupon a brief delay was had.)

* * * [in original transcript]

Q (By Mr. Bilkovic, continuing) Mr. France, let me ask you to backtrack and I do apologize. If you could just come down and take this 'V', and put it on People's proposed --- or People's Exhibit 4 to depict the area that you saw the van parked at. The white van.

Prior to any of this happening, when you saw the individuals walking towards the van.

A Right here (indicating). In that area right there

STATE OF MICHIGAN
IN THE SIXTH JUDICIAL CIRCUIT COURT
COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

VERSUS- File No. 2001-178216-FC

VAN CHESTER THOMPKINS, JR.,
Defendant.
_____/

TRIAL

Proceedings had in the above-entitled matter, held before the **HONORABLE RICHARD D. KUHN**, Judge of the Sixth Judicial Circuit Court, County of Oakland, on **Tuesday, May 14th, 2002 (2nd day)**.

APPEARANCES:
MARK BILKOVIC
Assistant Prosecuting Attorney
Appearing on behalf of the People

CORBETT O'MEARA
Attorney-at-Law
Appearing on behalf of the Defendant

* * *

[Page 10]
[Q by Mr. O'Meara; A by Frederick France]
Q You're outside of your vehicle as this point and it is clear as day, correct?
A I wouldn't say as clear as day, it was night. But, it was lit out there yeah.
Q And, you are thirty (30), forty (40) feet away?
A Approximately.

Q Are you near-sighted or far-sighted?
A I don't know.
Q Is it --- do you need your glasses --- you wear glasses, are they ---
A (Interposing) These aren't prescription glasses. Fashion glasses.
Q So, you --- as far as you know you ---
A (Interposing) I have twenty-twenty (20/20) vision, I think they're fine.
Q You --- and, your testimony was that the person was wearing this black leather jacket is the person you identified as being Mr. Thompkins?
A Yeah.
Q And, you're sure this jacket is black?
A Pretty much. As much as I can be. You know, like I say, I wasn't standing their studying their clothes. I wasn't trying to stare at the clothes or things they had on. I was looking at them.
[Page 11]
Q And that's ---
A (Interposing) At his face.
Q And, how long did that interaction take?
A How long did the interaction take?
Q You're staring from thirty (30) feet away. Minutes, hours?
A Well, it was long enough to sit there and say, 'What you all looking at?' Maybe fifteen (15) or twenty (20)?
Q Fifteen (15), twenty (20) seconds.
A Yeah, maybe.
Q And then you do the intelligent thing and you do the reasonable thing, you motion to Mr. Morris to get back in the car, 'Forget about this.'
A Yes.
Q You're not going to escalate the situation, correct?
A (No verbal response.)
Q Is that true?
A Yes.

Q And they appeared to be moving on down the parking lot toward the van.
A They were already by the van. They were already there.
Q Because they were moving in that direction?
A Yeah, and they had already made it to the van.
Q And one of the guys ---

* * *

[Page 20]
[Q by Mr. O'Meara; A by Frederick France]
A (Interposing) Barely. Barely. You know, roughly the distance.
Q Roughly the distance, maybe a little farther?
A Yes.
Q The van was elevated, correct?
A Yes.
Q The Baretta is a low car, a sports car?
A No, I wouldn't say no sports car. It is a real low car.
Q It is a low riding. It not up on, you know ---
A (Interposing) No.
Q (Continuing) big wheels or anything, correct?
A No.
Q And, there is a two or three second period of time when --- and you would actually be sitting to the Court Reporter's right, that's where you are correct?
A Yeah.
Q Now, your ability to identify who the passenger in that car is isn't based on your ability to see them getting into the car, it is based upon your ability to see them at that moment, those two or three seconds ---
A (Interposing) No, actually I had seen them, he was staring at me when he first walked out of the building. When he walked out and walked in front of the car, around the car and to the back I was still staring at
[Page 21]

him, directly in this face.

And, then when he rolled up to us I looked and it was the same guy that was staring at us, which is him.

Q Big guy, black jacket.

A Same guy, his face, I looked at his face, I wasn't going by his jacket. I'm tell you his jacket because that is what he had on, but I was looking at his face, I wasn't studying his clothes.

Q A face you are never going to forget?

A Exactly.

Q This face, the face that we see in front of us right here?

A Exactly.

Q Same face that is in that little picture?

A Exactly. Well --- yeah, same face, same person.

Q Now, you're looking through for those two or three seconds this --- is this a picture of the Baretta?

A Yeah.

Q The way it was that night?

A Yeah. That's it.

Q And, this is the crumpled plastic?

Is that a fair and accurate representation--- representation of the way the vehicle looked that

* * *

[Page 25]

[Q by Mr. O'Mera; A by Frederick France, continuing]

[Q continuing] Morris, that hand comes up he leans out the door and shots are fired?

A Yeah.

Q And, that is the image that you relive over and over in your mind every day for the past twenty-five (25) months, twenty-seven (27) months?

A Pretty much, yeah.

Q The shooter using his right hand to pull the trigger and kill Samuel Morris?

A Pretty much, yeah.

Q Pretty much?
A Yeah. That's my --- that's my ---
Q (Interposing) That's what you remember?
A Yes, sir.
Q That's the image that is emblazoned on your brain?
A (No verbal response.)
Q And, are you --- are you confused about what you saw?
A No.
Q Are you sure about what you saw?
A Pretty sure, yes.
Q Pretty sure?
A As sure as I can be, yeah.
Q As sure as you are that you are sitting here talking to me today?

* * *

[Page 27]
[Q by Mr. O'Mera; A by Frederick France, continuing]
[A continuing] the police.
Q You don't remember ---
A (Interposing) I know they got that in the reports, you mentioned it to me before, but I don't remember saying nothing like that.
Q Never would have said that?
A I don't remember saying nothing like that.
Q Was the person light-skinned?
A No.
Q Would you ever have described Mr. Thompkins of being light-skinned?
A No, he's not light-skinned.
Q What would you say his complexion is?
A Dark brown.
Q Dark brown?
A Yeah.

Q Now, you did talk to the police officers at the scene, correct?
A Um --- What they say?
They asked me was I hurt at the scene. Yeah, I was hurting at my side. I don't think they asked me---
Q (Interposing) Oh, no. And, you said at the scene you weren't yet in pain, correct, Mr. France?

* * *

[Page 36]
[Q by Mr. O'Mera; A by Frederick France]
Q Do you recall telling them that the shooter was wearing a black leather jacket and blue jeans?
A Yes.
Q Because that is what the shooter was wearing, correct?
A Yes, from my recollection, yes.
Q And, you didn't tell them anything about any other colors that were in this black leather jacket, did you?
A No.
Q And, there wasn't anything that secured your vision, your ability to see whether or not this was a black leather jacket was there?
A No.
Q Do you remember telling them that the shooter had light skin black male?
A No, I don't remember that.
Q You don't remember that?
A No.
Q You would never had said that?
A I can't see why. He is not light skinned. I'm not no fool, I can't take him for light skinned. I can't remember telling them nothing like that.
Q He's not light skinned?
A No.
Q He's not medium skinned either?
[Page 37]

A No, he's about dark brown.
Q Dark brown.

And, that is a character in describing people. That's a characteristic, that's an important characteristic, not that it matters whether--- what kind of human being you are, but that is distinguishing characteristic, correct?

A Yeah.
Q Your skin tone?
A Yes.
Q Do you recall telling them that you had no further suspect information, other than the fact that it was a twenty-three (23) to twenty-five (25) year old, short Afro, light skinned black male, six one (6'1"), wearing a black leather jacket and blue jeans?
A No, I never them about those.

Like I --- I don't remember telling them he was light skinned either, so I can't necessarily agree with that.

Q And, of course, that night, just like you told us here today, you knew one thing about one of the guys was that he was chubby. And, you don't know just that he's chubby, because he looks chubby in this picture, do you?

That's not why you think he is chubby, right?

[Page 38]

A No. I looked at when he came out that night, I was looking at him.
Q And, you knew that already, right?
A Yeah.
Q And, so you told the police that night?
A Yeah, when they showed me pictures, when I got hold the picture, you know, shooter, driver, and the passenger as well.
Q You were showed this picture (indicating), correct?
A The one --- yeah, I seen all of them actually.
Q And, now in this picture (indicating), and this is a blow-up and the Jury has it has been admitted.

Do you have a more duller, smaller ---

MR. BILKOVIC: (Interposing) It's right here.

Q (By Mr. O'Mera, continuing) This is the picture you were shown, is that true (indicating)?

A Yes.

MR. O'MERA: If I may approach, and apologize, your Honor, I keep doing that.

THE COURT: Certainly. You may.

Q (By Mr. O'Mera, continuing) Um --- tell me that is not an --- a crystal clear picture, is it?

A No.

[Page 39]

Q What color is --- the person --- you identified this guy here (indicating)?

A Uh-huh.

Q With the hat?

What color jacket is he wearing?

A It looks black.

Q It looks black.

A Yeah.

Q In that picture it looks black?

A Yes.

Q And, also, what color is this jacket that this guy's wearing (indicating)?

A Black.

Q It's it is black, right?

A Yes.

Q And, so, as far as you can tell from this picture (indicating), this is the guy wearing a black leather jacket?

A Which one?

Q Well, both of them?

A Yeah.

Q And, so when you --- like --- when --- this conforms when you see this you see a guy with a skinny face wearing a black leather jacket, right?

[Page 40]

A I seen the guy that I looked at that night.

Q You seen the guy that was ---
A (Interposing) That was staring at me, and it is the same guy that shot me, that's what I saw.
Q Same guy you stared at for fifteen seconds?
A Yeah.
Q And it is the same guy who shot you?
A (No verbal response.)
Q And the police, in no way, shape or form suggested to you that these were suspects?
A (No verbal response.)
Q Or, did they?
A I guess you could say that. Yeah, you know, they brought pictures in and say, you know, 'These are the guys, you know, some of the guys that were --- people that were in the restaurant around the time of the shooting,. We would like you to look at these pictures. '

You know what I'm saying, 'Tell us, you know, if these other people who you believe shot you in here. So, do you know who shot you?

Which one, you know, shot you?'

And do I know the driver, passenger, all the other stuff.

[Page 41]

Q In order to look up out of this window (indicating), in this car, this Baretta, would you be able to see from over there by where they were jumping into the van?

You testified here that you had to -- to lean over Mr. Morris, correct?
A Lean over him? I just went like this (indicating), just lean forward, actually, not over. Forward.
Q And do, from over there you are just moving forward, you don't need to get closer to the window and look up and see the van?
A Um-um.
Q So, your ability to see in this two or three seconds is across Mr. Morris, up to this van and into the van through this crumpled piece of plastic?
A Could you say that again?

Q Withdraw the question.

You immediately upon see this gun, both you and Mr. Morris do the intelligent thing, which is flee, correct? Start moving toward the other side of the car?

A Naugh. He had already shot. Like, you know, when I seen him, I don't know Mr. Van was thinking, but when I seen the lifting of the gun I was moving. But apparently Sam wasn't moving as fast as I was, because [Page 42]

he got shot in the chest.

If he was trying to get out he would have catched it on his back.

Q You were moving as soon as the gun start coming up?

A Pretty much, yeah. Yes.

Q But, you never looked back?

A No.

Q You were running?

A (No verbal response.)

Q Eventually you find out, relatively soon, that this chubby guy has turned himself into the police.

Did you learn that?

A Yeah.

Q And, did the police tell you what his story is?

A Naugh.

Q But, you attended the Preliminary Examination?

A Yes.

Q Did you go and talk to the Prosecutor about what he said happened?

A No.

Q Does --- but, you testified at the Preliminary Examination?

A Yeah.

Q Do you --- you understand that --- at that point that

[Page 43]

this picture (indicating) --- and you don't see it while you were in the hospital because you didn't have your t.v. turned on for two days?

A No.

I didn't see---

Q (Interposing) Before they show you this picture (indicating), you don't see it on t.v.?

A No, I hadn't seen no t.v., no.

Q You don't talk to anybody about this?

A No.

Q But, after that, you understand that people start looking for the person who is identified in this picture, correct?

A After I told who he was, you know, who was who.

Q After that you understand that the police start looking for people identified in this picture, correct?

A Yeah.

Q And do you see it on t.v.?

A Actually I ---Actually I had never saw it on t.v. I never got a chance to see nothing on t.v.

Q You did have an opportunity to see it that night, correct?

A What you mean?

Q That night ---

* * *

[Page 48]

[Q by Mr. O'Mera; A by Frederick France, continuing]

[Q continuing] that shot you?'

A Yes, that's what they asked me.

Q That's the gist of what they said?

A Yes.

Q You said, you looked at it and you said, ----

A (Interposing) Naugh, naught not like that, that I looked at it --- I didn't pick immediately. Like I had to look through it, you know.

Q You took your time?

A Yes.
Q You looked at each of the pictures individually?
A Yes.
Q Including this picture (indicating)?
A Yes.
Q And, even though this picture was distinct that it was the youngest person who was depicted, you picked another picture?
A Yes.
Q And, while you didn't indicate that you were rock solid sure, that was the guy that shot you, you said of these nine, 'That's the one I think did it.'

Is that a fair ---
A (Interposing) Yeah, it's a photo lineup, you know, obviously somebody --- one of the guys is him.
[Page 49]
Q You think that, you think that just because you are shown a group of pictures one of the people must be the person that committed the crime?
A Right. At that point in time that's what I was thinking.
Q But, you were actually shown another photo lineup in this case?
A Yes.
Q A photo lineup that didn't involve the person you picked for Mr. Thompkins, and you didn't pick anybody out of that one, correct?
A Naugh. I don't know --- I don't know if it involved a person that I think --- the first time. I'm not --- I don't know, I can't remember.
Q But, you did see one photo lineup where you picked nobody, correct?
A Yes.
Q So, you know that is an option when you're looking. Did the police officers tell you --- the police officers that showed up at your house, did they tell you, 'You have to pick one of these people.'
A I don't believe so, no.

Q Did they tell you the person who shot you was one of these people (indicating)?

[Page 50]

A Nope, I don't believe so. Nope, all he said was, you know, 'We've got a photo lineup. We want you to take a look at it, and if you can't, just go through the pictures and if you see the person that shot you, you know, point him out. '

Q And, you took your time to look through it?

A (No verbal response.)

Q And you picked somebody that wasn't Mr. Thompkins?

A Exactly.

Q And, then they said, more or less you messed up, this is the guy that was in this picture?

A No. They said --- they said, 'Naugh --- The person that I picked like 'That's not the person that you identified before as being the shooter. '

Q And, did they show you that this was the picture of the person that you had identified before as being the shooter (indicating)?

A Yeah --- that's like --- yeah, this is the person who you did initially.

Q And, your testimony is that because this picture – this picture obviously depicts a teenager and, is, therefore, totally unidentifiable to you as being Van Chester Thompkins?

A I didn't know him when he was --- back then. Apparently

* * *

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[Q by Mr. Bilkovic; A by Frederick France, continuing]

THE COURT: That's all right.

MR. BILKOVIC: Old habits die hard.

THE COURT: Mr. Bilkovic?

REDIRECT EXAMINATION

BY MR. BILKOVIC:

Q When you testified at Eric Purifoy's trial, who did you testify shot you?

A Van Thompkins.

Q When you testified in Eric Purifoy's trial, who did you testify was the driver of the car that drove Van Thompkins to shoot you?

A Eric Purifoy.

Q When you were in the hospital, I believe there was some questions as to the caliber of the gun.

Do you remember every single thing you told those officers when you were in the emergency room watching your friend being operated?

A No. I don't remember everything. No, I don't.

Q So, it is possible you might have said something with respect to the caliber of the gun, you just don't remember?

A I could have. Like I say, he asked me if I had --- you know, if I had to guess what kind of gun it is, what would I say it is.

[Page 53]

You know, like I say, I don't know what type of gun it is, just by looking at it.

Q On the evening of January 10th, 2000, when you got into the stare-down, were you focusing on the person's clothing or were you looking at their face?

A I was looking at their face, their eyes. You know, they was staring at me.

Q And the person that pulled up in the van and said, 'What's up, Dog?' or, 'What did you say, Big Dog?" and pulled out a gun, were you focusing on the clothing or were you focusing on the person's face?

A On the face.

Q Whose face were you focusing on?

A Van Thompkins.

Q In the description that Mr. O'Mera got into, at the little bit in the hospital, do you remember telling the officers, when you gave a description about the --well,

first of all, you don't remember whether you said light-skinned black male or no, do you?

A I don't remember saying nothing like that.

Q Do you know whether or not you said medium skinned black male?

A Nope.

Q Do you recall indicating that the person that shot you

[Page 54]

had a shot Afro, black male, six foot one?

A I remember all that. Like I say, I can't remember why I would say he was light-skinned. He's not light-skinned, he's dark.

I can't even imagine myself even saying that.

Q Did you describe Eric Purifoy as being six foot one?

A Naugh.

Q Would you describe Eric Purifoy as having an Afro?

A Nope.

Q In fact, Eric Purifoy is bald, isn't he?

A I believe so.

Q When you were shown this photograph, People's Exhibit 9, prior to then, during then, or after then? After it, did the police ever tell you who to pick out as to who shot you?

A No.

MR. BILKOVIC: I have nothing further, your Honor.

THE COURT: Mr. O'Mera, anything further?

RECROSS-EXAMINATION

BY MR. O'MERA:

Q When was Eric Purifoy bald?

A When was he bald?

Q Yeah yes.

[Page 55]

I apologize.

A I have no idea.

Q And, was he bald the night he shot ---
A (Interposing) I don't know.
Q Well, you just said --- he said, 'Is Eric Purifoy bald?' And you said ---
A (Interposing) I said, 'I believe so.' I've seen since him then. I don't remember him having no hair. You know, I know he had no bro, no braids or anything like that.
Q You don't have any specific recollection what his hair looked like that night do you?
A No.
Q You don't have any specific recollection about what Mr. Thompkins hair was like that night, do you?
A It was an Afro.
Q It was an Afro?
A Yeah, because it was like when they rode up on me he had took off his hat.
Q He took off his hat?
A Yeah.
Q How about Mr. Purifoy, did he ever take off his hat?
A I don't know.
Q You don't know.

[Page 61]
[Q by Mr. Bilkovic; A by Steven Schneider]
A Not off the Rite Aid videos.
Q Was there anything on the Rite Aid videos that showed any aspect of the shooting or any aspect of the vehicles that were involved in the shooting?
A No aspect of the shooting or the vehicle.
Q What about any witnesses inside the Rite Aid?
A No.
Q Then where did you go?
A There was only one other business that was open in the strip mall, and that was Lou's delicatessen down.
Q Did you and Detective Dziedzic go to Lou's Delicatessen?

A Yes, we did.
Q And, why is it that you went there?
A Again, looking for witnesses that may have seen what had happened. And, when we entered we noticed that they also had video surveillance within the store.
Q So, then what did you do?
A We met with the manager and asked him if we could review the tape to try and identify any of the individuals that may have been in the delicatessen before the shooting occurred.
Q Why were you focused on Lou's?
A Again, when we met with patrol officers they indicated that there was an initial argument in the parking lot
[Page 62]
between a group of young men, and some of those young men came out of Lou's Delicatessen.
Q So, when you went into Lou's, then what happened after you met with this individual in there?
A He took us back to his office and we reviewed the tape that was still playing within the video surveillance unit. And we took it back, I believe an hour before the shooting to see if we could identify anybody coming into the store.
Q What type of video tape was this, could you describe it?

I mean, is it a continuous camera that runs on one area of the store?

When you were looking at the tape, what were you seeing?
A It jumped. It was a four-screen tape and it jumped to different areas in the store. The lobby, the cash register.
Q And, when it jumps, and for example, it goes from the lobby to the cash register, is there active movement of people at the cash register or does it flash still photographs?
A It is actual movement.

Q When you were reviewing the video tape, you indicated you took it back approximately an hour prior to when you

[Page 63]

had received information that the shooting had occurred?

A Roughly.

Q And, did you notice anything during the video that you thought was important?

A A group of young men that entered the store, that roughly fit the description.

Q Do you recall approximately what time it was that these individuals entered?

If you know?

A I want to --- I'm guessing. And I would say half an hour before the shooting.

Q And it might have been some time prior to nine o'clock (9:00)?

A Correct.

Q Had you ever seen these individuals before?

A No, sir.

Q Do you have any idea whether or not they were involved in the shooting?

A No, sir.

Q Did you do anything with that video tape?

A Um---we confiscated the tape and it was later taken to the State Police.

Q Do you recall when?

A The following day.

[Page 64]

Q What was done at the State Police?

A We sat down with one of their investigators and he was able to enhance the video to try to make a clear image of the photos that were taken in the delicatessen.

Q How many photographs were compiled, was there more than one?

A There was more than one.

Q What were done with those photographs?

A Again, they were enlarged, duplicated as stills, came back to the police station and I met with our information officer, who is our media relations officer and requested that the photos put on the various news channels to try to identify these individuals that may either be witnesses or possible suspects.

Q Did you take those photographs anywhere else?

A Um --- Yes.

Q Where did you go?

A Again, myself and Detective Dziedzic met with one of the victims that survived the shooting. He was being treated at Providence Hospital.

Q Would that be Frederick France?

A That's correct.

Q And that was the day after the shooting, January 11th?

A Yes, sir.

[Page 65]

Q And, did you meet with Mr. France?

A Yes, sir.

Q What was his condition, when you met with him?

A He was in guarded condition. His spirits were up. He was able to talk to us, he was clear, he was coherent, and he understood what we were talking about. I don't believe he was on any heavy medication at the time.

Q And, what did you do when you met with Mr. France?

A We asked him to look at the series of photos that we had produced.

Q Did you give any instructions with respect to the series of photographs?

A Just that --- if he could recognize anybody within the photos?

Q Did you tell him the person that shot him was in the photograph?

A No, sir, I did not.

Q Did you tell him that the driver of the car, of the van, was in the photograph?

A No, sir, I did not .
Q Why not?
A That --- that --- that wouldn't be a good investigative tool. If I'm going to --- I didn't know, to be honest.
[Page 65]
I didn't know if these were witnesses, if they were possible suspects.

That's the whole purpose was him to clear that up for us.
Q You indicated that you gave him a series of photographs?
A Yes, sir.
Q Were these given to him all at once?
A No.
Q Once at a time?
A Yes, sir.
Q I am showing you what has been previously marked as People's Exhibit 9 (indicating), do you recognize that?
A Yes, sir.
Q And what is that?
A Uh --- it's a still photo reproduction of the video tape from Lou's Deli.
Q Is that one of the photographs that you showed Mr. France?
A Yes, sir, it is.
Q Upon viewing that photograph, did Mr. France indicate anything to you?
A He immediately pointed to the first individual in the photograph. Pointing at him saying, 'He was the shooter.'
[Page 67]
He then went left to right pointing at the second individual saying, 'He was the driver.' And he couldn't identify the third individual.

Q Were you asking him questions like, 'Tell us who the shooter is.' 'Tell us who the driver is.' Or did he just offer that to you?
A No, sir. We just --- um --- let him look at the photos again. We asked him if he recognized anybody in these photos?
Q How much time passed when given that photograph and him indicating to you it was the first person in the photograph was the shooter?
A Instantly.
He took some time to look at number three, and said he didn't recognize him.
Q What about number two, how much time did he take to look at number two and indicate that that was the driver?
A He just pointed right to him and identified him as the shooter.
Q I'm talking about number two, the middle person?
A Um --- it was one, two, three. He went right down the line.
Q Did he make any reference to clothing to you?
A Um --- yes. He said that they were wearing Pele-Pele
[Page 68]
jackets.
Q Are you familiar with what a Pele-Pele jacket is?
A Yes, sir.
Q What is a Pele-Pele jacket?
A It's just a brand name of a leather coat that has detailed embroidery logos on it.
Q Were you able to ascertain the first person in that photograph as wearing a Pele-Pele jacket or do you not know?
A It looks to be a jacket. Again, it is black and white, so you would have to see a colored photo to -
Q During your meeting with Mr. France, did he waiver at all that the first person in that photograph was the shooter?

A No, sir, he did not.
Q Did he ever indicate to you any doubt that he had about the first person being the shooter?
A No, sir.

MR. BILKOVIC: May I have a moment, your Honor?

(Whereupon a brief delay was had.)

* * * [in original transcript]

Q (By Mr. Bilkovic, continuing) In the Exhibit that you are looking at, People's Exhibit 10, that is up on the

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easel, do you recognize that (indicating)?
A Yes, sir.
Q The top photograph, this is a series of four photographs, is that correct?
A That's correct.
Q The top photograph, is that a photograph that you recognize?
A Yes.
Q And, is that basically an enlargement of People's Exhibit 9. the photograph, that you actually showed Mr. France?
A Yes, sir, it is.
Q Who did Mr. France immediately point to and identify to as the shooter?
A This individual right here (indicating).
Q Who did Mr. France immediately point to and identify as the driver?
A This individual here (indicating)
Q And who was the third person?
A West --- the third line here.

MR. BILKOVIC: I have nothing further, your Honor.

THE COURT: Mr. O'Mera.

MR. O'MERA: Just a few questions.

* * *

[Page 86]
[Q by Mr. Bilkovic; A by Robert Farquhar]
A The purpose was to recover a vehicle that we believed was involved in the homicide.
Q And, who did you go to that location with?
A I was there along with Detective Helgert and --- I'm not sure who else was there.
Q Were there other officers there, though?
A Yes, there was.
Q Are you --- you are obviously familiar with the Rite-Aid area, the Rite-Aid that is at Nine and Greenfield.

Can you describe where this address on Maple Ridge is?
A It's --- it's on the north side of Maple Ridge and would be west of Gratiot.
Q And, how far is that area from where the shooting area was at the Rite-Aid?

Mile-wise?
A I would have to guess at perhaps eleven (11), twelve (12) miles, perhaps.
Q And, when you got to that location can you describe the scene, is this a residence?
A It was a residence.
Q Describe it?
A It was a brick home, a driveway leading to the back of ---and a garage in the back.
[Page 87]
Q Did you have contact with the occupants of that home?
A I did not.
Q Do you know if anybody did?
A I'm not certain.
Q What did you observe when you arrived at that area on Maple Ridge?
A I observed, after walking up the driveway, looking to the back of the house there was a white van in the back yard.

It was --- it had been pulled to the back of the home. It could not be seen from the street.

Q All right.

Showing you what has previously marked as People's Exhibit 5 (indicating), do you recognize that?

A That's the white van behind the home.

Q And, is that the condition of the van as it appears when you observed it back on January 13th of two thousand (2000)?

A That's correct.

Q Describe the condition of the van that you saw?

A The van was --- had been parked behind the home on the yard. The wheels and tires had been removed, and it was either on jack stands or, I believe, there might have been a jack still underneath holding it up.

[Page 88]

But, it was without the wheels and tires.

Q When you responded there it was already up on jacks?

A That's correct, sir.

Q I notice in one photograph it is fairly dark. So I am going to show you two Polaroids taken of the same thing. People's proposed 15 and 16, do you recognize those (indicating)?

A Yes.

Q What are they?

A They are the pictures that I took that evening and behind the home.

Q And, those are the enlargements right there that we have up there (indicating)?

A Yes.

Q What was done with the van?

A I'm sorry?

Q What was done with the van?

A The van was impounded and towed eventually to the Southfield Police Department evidence garage.

Q And, how was it taken out of the backyard?

A It was the wrecker responded and dragged it from behind the home, and managed to drag it down the driveway and get it loaded up.

Q And, was there any difficulty in doing that?

[Page 89]

A A considerable amount of difficulty, actually.

Q Describe it, what was it difficult?

A Without the wheels and tires it is hard to move. There was a lot of snow, and there is not a lot of room to maneuver in the back yard, either.

And the driveway, itself, was quite narrow. It was very difficult to get it straightened out and down the driveway.

Q Was any portion of the van and the driveway?

A Not that it can be seen from the street, no.

Q Where was the van, in relation to the back of the house?

A It was facing east and west, just like Maple Ridge, the street. And it was in fairly close proximity to the back of the home itself.

Q And, in any event if somebody was driving down Maple Ridge you would not be able to see that van located there, correct?

A No.

MR. BILKOVIC: I have nothing further, your Honor.

MR. O'MERA: I have no questions, your Honor.

THE COURT: You are excused, sir, thank you. You may step down and watch your step, please.

Would you call your next witness?

STATE OF MICHIGAN
IN THE SIXTH JUDICIAL CIRCUIT COURT
COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

VERSUS- File No. 2001-178216-FC

VAN CHESTER THOMPKINS, JR.,
Defendant.
_____/

TRIAL

Proceedings had in the above-entitled matter, held before the **HONORABLE RICHARD D. KUHN**, Judge of the Sixth Judicial Circuit Court, County of Oakland, on Thursday, May 16th, 2002 (3rd day).

APPEARANCES:

MARK BILKOVIC
Assistant Prosecuting Attorney
Appearing on behalf of the People

CORBETT O'MEARA
Attorney-at-Law
Appearing on behalf of the Defendant

* * *

[Page 5]
[Q by Mr. Bilkovic; A by Omar Stephens]
[Q continuing] Chester Thompkins?
A Yes.
Q Do you see him in court today?
A Yes.

Q Please point to him and tell me what he is wearing?
A Cream shirt.
MR. BILKOVIC: Let the record reflect identification of the Defendant, Chester Van Thompkins.
THE COURT: It may so indicate.
Q (By Mr. Bilkovic, continuing) Sir, I need you to keep your voice up for the Jury, okay?
A Yes.
Q How is it that you know the Defendant?
A I used to hang out with him and smoke weed with him in the Hood.
Q Would you characterize your relationship with him as friendship?
A Yes.
Q How long were you friends with him for?
A I've known him for about six years.
Q Six years you knew him for?
A (No verbal response.)
Q How do you fee about being here today?
A Not good.
[Page 6]
Q Fair to say you don't want to be here?
A Yes.
Q Are you aware of a homicide that took place in the City of Southfield back in January of two thousand (2000)?
A Yes.
Q How did you become aware of that?
A I seen Jay's face on the t.v.
Q You had --- when you say 'Jay', who are you talking about?
A Van Thompson.
Q Why do you call him Jay?
A That's what we called him in the Hood.
Q Showing you what has been marked people's Exhibit 9, do you recognize that?
A Yes.

Q What is that?
A A photograph.
Q Photograph of what?
A Of Jay.
Q Is this the photograph that you saw on t.v.?
A Yes.
Q And, when you say Jay, you are talking about Van Thompkins, correct?
A Yes.
[Page 7]
Q After you saw that photograph, who were you with when you saw the photograph?
A Who was I with?
Q Yes.
A I was at home. I seen when I seen him.
Q Pardon me?
A I was at home when I seen him.
Q You have a --- at the time, did you have a girlfriend by the name of Tamika?
A Sister.
Q Oh, I'm sorry, sister named Tamika?
A (No verbal response.)
Q Is that a 'yes'?
A Yes.
Q Was she at home with you when you saw this?
A Yes, I think she was there too.
Q Did there come a point in time, after seeing this, that you had Tamika try and get a hold of the Defendant?
A Yes.
Q Did she?
A Yes.
Q How much time after seeing that photograph?
A Probably a month after.
Q Pardon me?
[Page 8]
A Probably a month after.
Q A what after?

A Month, month after, or a couple of weeks after.
Q Do you know whether or not your sister was able to get hold of the Defendant?
A Yes.
Q What happened next?
A She talked to him on the telephone.
Q What did you do?
A I talked to him next.
Q You talked to him next?
A (No verbal response.)
Q Is that a 'yes'?
A Yes.
Q What did you talk to him about?
A Oh, about what happened.
Q Tell the Jury about the conversation?
A I just asked him what happened. He told me he had popped them niggers up.
Q I'm sorry.
A He told me he to pop them niggers up.
Q He told you he had to pop them niggers up?
A Yes.
Q Did he say why?
[Page 9]
A They got into it.
Q He told you they got into it?
A (No verbal response.)
Q Is that correct?
A That's not really what --- he didn't say he got into it, but...
Q What did he tell you?
A He just told you me he had to pop them up.
Q He had to pop them up?
A Yes.
Q Did he mention Eric Purifoy at all, too?
A Excuse me?
Q Did he mention the Eric Purifoy at all to you?
A No.
No, sir.

Q Do you know Eric Purifoy is?
A One of his riders.
Q Did you see the middle person on that photograph?
A Yes.
Q Is that somebody you recognize?
A I seen him before.
Q When you asked the Defendant about what happened in Southfield, did he ever tell you, 'Hey, I didn't do anything. Eric Purifoy shot these guys.'?
[Page 10]
A Not that I'm aware of.
Q Did he tell you anything else?
A Not that I'm aware of.
Q Anything that you can remember?
A (No verbal response.)
Q Is that a 'no'?
A That's a no.
Q Did you ever see the Defendant after that?
A No, sir.
Q Do you know where he was at when you called him?
A I think over at his girlfriend's house.
Q Do you know what he was doing over there?
A Hiding out.
Q Pardon me?
A Hiding out.
Q Hiding out?
A Yes.
Q Are you aware, back in January of two thousand as to what type of vehicle Van Thompkins was driving?
A A van.
Q A van?
A Yes.
Q Can you describe the van?
A White with a crash --- a little dent on the side.
[Page 11]
Q Anything else, other than white?

A Yeah, I think it had blue stripes with some gold D's on it.
Q What are 'gold D's'?
A Tires.
Q Gold D's stand for Dayton Gold Spoked Dayton rims?
A Yes. Yes.
Q Had you ever been inside of that van?
A Yes.
Q How many times have you been inside that van?
A A lot.
Q What's a lot.
A About six, seven times.
Q Do you know what happened to that van after January 10th?
A I think he sold it.
Q Did he tell you what he did with it?
A No, sir.
Q Do you remember talking to Detective Helgert, Detective Literacki back on February 27th of the year 2000?
A Yes.
Q Do you remember telling them that Thompkins explained that he was ---

MR. O'MEARA: (Interposing) Your Honor, I
[Page 12]
am going to object to the introduction of the prior statement, unless it's purpose is to impeach his own witness.

MR. BILKOVIC: That's my purpose.

THE COURT: You may do it.

Q (By Mr. Bilkovic, continuing) Do you remember telling the Detectives that Thompkins explained he was in hiding and got rid of the van, took the rims off, removed his stereo and sold them to get some money?
A Yes.

Q You specifically don't know where he put the van though?
A No.
Q Do you recall ever seeing Van Thompkins with a firearm?
A Yes.
Q Do you know whether or not Van Thompkins carried a firearm?
A Yes.
Q How did you know Van Thompkins carried a firearm?
A I seen it before.
Q Do you know the difference between a semi-automatic and revolver?
A Yes.
Q What type of firearm did Van Thompkins carry?
A Automatic.
[Page 13]
Q What color was it?
A Black and gold.
Q What caliber was it?
I'm sorry?
A Black and gold.
Q What caliber was it?
A A forty-five (.45).
Q Mr. Stephens, in 1999, is it true that you were convicted of the crime of Armed Robbery?
A Yes.
Q Is it my understanding that it involved a dispute with you and your ex-girlfriend over a necklace?
A Yes.
Q Other than that, do you have any other crimes involving theft or dishonesty?
A No, sir.
MR. BILKOVIC: May I have a moment, your Honor.
THE COURT: You may.
(Whereupon a brief delay was had.)

* * *[in original transcript]

Q (By Mr. Bilkovic, continuing) After the shooting, other than this one phone call you described, did you ever talk to Mr. Thompkins on any other occasions?

[Page 36]

[Q by Mr. Bilkovic; A by Ben Damschroder]

Q And, why did you go to a car dealership?

A We were dispatched to the car lot to wait for a suspect and suspect vehicle.

Q I'm sorry?

A We were waiting on a suspect and a suspect description given over the are who was wanted for a homicide.

Q And, did you have a name attached to that suspect?

A Yes, we do.

Q Would that name be Chester Thompkins?

A Yes.

Q And, were you given a description that you were looking out for?

A Yes, sir, it was the --- a small blue vehicle. I don't remember gave the names over the area. They gave, I believe, it was a Minnesota tag and the tag number, which I don't recall.

Q Minnesota license place tag to it?

A Yes.

Q And, did you got to that car dealership then and set up surveillance?

A Yes, we did.

Q When you say 'we', were you by yourself or were there other officers do the same thing.

A There was other officers sitting around the area.

[Page 37]

Q And how long did you go to that location for?

MR. O'MEARA: I want to see if this is a witness in the courtroom.

Sorry to hold you up, I apologize.

Q (By Mr. Bilkovic, continuing) How long were you at that location for?

A On this day I don't recall. We had been sent there on a similar time.

I would say we were there for about ten (10) minutes before I saw the vehicle pull off the lot.

Q You indicated that you were there for about ten (10) minutes and you saw a vehicle pull off the lot?

A Yes, sir.

Q Did it match the description of the vehicle you were given?

A Could you tell how many occupants were in it at first?

A There was --- I believe two occupants in the vehicle and it was followed by a second vehicle that left the lot at the same time.

Q Could you tell how many occupants were in the second vehicle?

A No, I couldn't there was tinted windows.

Q Tinted windows?

A (No verbal response.)

[Page 38]

Q Is that a 'yes'?

A Yes, sir.

Q So, what did you do after these two vehicles left the lot?

A I pulled in behind them and tried to wait for another vehicle to --- another cruiser to catch up to me, so we could make a traffic stop on it.

Q When these vehicles --- when you pulled behind these vehicles, were these two vehicles continuing to drive?

A They only continued down the road for about two hundred (200) feet and then pulled into another --- a large center lot.

Q Prior to that, did you activate your overheads or something like that?

A No. No.
Q You indicated the two vehicles pulled into a large lot?
A Yeah.
Q And, what type of establishment?
A It's a shopping center, retail outlet store.
Q Where did the vehicle stop?
A They first pulled up --- it's probably several hundred (100) feet. They pulled up towards the building, circled the lot and then followed --- following each other the whole time and both vehicles parked somewhat
[Page 39]
side-by-side.
Q Did they park in the front of what would be the shopping center or did they park away from it?
A It was about halfway out the lot.
Q So, what did you do at that point?
A I aired that I couldn't wait for another car, they were starting to exit the vehicle.
So, I got out.
Q What do you mean you 'aired' it?
A Over the radio. I let everybody know that they were getting out.
Q And, then what happened?
A The --- by then I tried to place --- I believe there was four people altogether, between the two vehicles, and I decided to detain everybody since I didn't know exactly, I hadn't seen a picture of the suspect, I didn't know exactly who I wanted.
So, I decided to detain all four people and placed them on the ground. The first one on the ground
Q (Interposing) When you say 'you detained them and placed them on the ground', how did you do that?
As far as --- what did you do, how did you --- how did they know to get on the ground?
[Page 40]
A I spoke verbally, told them to get on the ground?
A How far were you from these people?

A Probably fifteen (15), twenty (20) feet. I was in the middle of the aisle for the parking lot and they were in the parking spots, just exiting the vehicle.
Q When you told them to lie on the ground, are you talking the way you are now, or were you talking louder?
A I was talking louder.
Q Did you have a firearm?
A Yes, I did.
Q Where was the firearm?
A In my hand.
Q Were you pointing at these individuals?
A Towards them, yes.
Q So, what happened after you ordered them to the ground?
A All but one of them went to the ground immediately.

The one that didn't was the driver of the second vehicle that didn't match the original description.
Q What happened to the driver?
A He wasn't complying with any verbal commands, basically wasn't getting on the ground.

He did eventually after some more cars coming to the area. And then he got down on the ground.
[Page 41]
Q He got down on the ground and what happened?
A I then started to move towards the other side of the car where I could see the other people that I had detained and were already on the ground.

And one of them had fled.
Q What do you mean, 'one of them had fled?'
A He had, evidently, rolled under some vehicles and started crawling to where I couldn't see him while I was dealing with the other individuals.
Q What happened when you noticed that?
A Um --- when I noticed, there wasn't a whole lot I can do. Like I said, I didn't know which one, exactly, I wanted.

So I stayed with the three people I had there, until another officer got to me.

Q What did you do when the other officer got to you?

A At that point I --- there were customers out in the lot, and they were all pointing towards the building.

So I headed up towards the building.

Q Still have your service revolver out?

A No, I holstered it.

Q Okay.

A At that point I got up towards the building and some customers that had been standing out there watching all

[Page 42]

the cars coming in pointed back out towards the roadway.

At that point I saw the person that had gotten out of the passenger's side of the black Monte Carlo.

Q What was that person doing?

A He was running. He was actually right running right towards the main roadway and peeling his jacket off at the same time, which I also aired that over the radio?

Q How far were you away from this individual at that time?

A Several hundred (100) feet.

Q So, what did you do at that point?

A Aired the direction that he was running, and started after him.

Q When you started afterward, you mean a foot chase?

A Yeah.

Q What happened next?

A There were some cars coming up the road after --- he basically stayed right on the side of the roadway, didn't go behind businesses or anything.

Ran, I believe south, on the road and I just kept following him on foot until another --- as soon as another

vehicle caught up he --- he had gotten down on the ground on his own.
Q As soon as another what type of vehicle?
A A police cruiser. I'm sorry.
[Page 43]
Q Police cruiser pulled up?
A Yes.
Q Where at
A Right along side of the roadway. Probably just several---
Q (Interposing) Couple of feet away from the person you were chasing?
A As soon as that car pulled in he got down on the ground.
Q And, what was done when he got down on the ground?
A He was placed in handcuffs and detained in a vehicle.
Q Do you know who Dick Parrish is?
A Yes, sir.
Q Who was that?
A At the time that was my sergeant with Meflen Township.
Q And, was this person eventually turned over to Dick Parrish?
A Yes, I believe that's whose car we obtained him in.
Q Were you later able to find out who this person was, what his name was?
A (No verbal response.)
Q Did you later learn what his name was?
A Oh, yes.
Q Who was that?
A The gentleman's name you mentioned earlier. Thompkins.
[Page 44]
Mr. Thompkins.
Q Chester Thompkins?
A Yes, sir.

Q Sir, how tall are you?
A Six foot two (6'2")
Q And, how much did you weight?
A Two seventy (270).
Q And, was that your height and weight back on January of two thousand (2000)?
A A little bit lighter.
Q A little bit lighter.

MR. BILKOVIC: I have nothing further.

THE COURT: Mr. O'Meara?

MR. O'MEARA: Oh, I don't have anything further.

MR. BILKOVIC: Your Honor, may I have a moment?

THE COURT: Oh, certainly.

(Whereupon a brief delay was had.)

* * *[in original transcript]

MR. BILKOVIC: Nothing further, your Honor.

THE COURT: Mr. O'Meara?

MR. O'MEARA: Oh, I don't have any questions, your Honor, thank you.

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THE COURT: You are excused, sir.

Thank you. You may step down, watch your step, please.

You may call your next witness.

MR. BILKOVIC: People would call Rick Parrish to the witness stand.

THE COURT: All right, you may.

MR. BILKOVIC: Officer Parrish.

THE COURT: Would you swear the witness, please.

THE CLERK: Yes, Judge.

Sir, would you please raise your right hand.

Do you solemnly swear that the testimony you shall give before this Court shall be the truth, so help you, God?

THE WITNESS: Yes, sir, I do.

THE CLERK: Thank you, you may be seated.

JAMES PARRISH

WAS THEREUPON CALLED AS A WITNESS HEREIN, AND AFTER HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. BILKOVIC:

Q Sir, can you please state your full name and spell your last name?

A James Richard Parrish, P A R R I S H.

Q And, sir, how old are you?

A I can't lie, I'll be fifty-five (55). I think. No one ever asked me that.

Q I don't want to embarrass you, I just want to make sure when somebody reads the transcript they are not reading of like a two or three year old.

Q That's fine.

A Otherwise there is no way to know.

Q Sir, how are you employed?

A I'm a police officer.

Q Where are you a police officer at?

A Clinton Township Police Department.

Q Is that in Ohio?

A Yes, sir, it is.

Q How far is that from Columbus, Ohio?

A In the middle of Columbus.

Q And, do you know Officer Damschroder, who just testified?

A Real well.

Q How long have you been a police officer for?

A Total law enforcement twenty-eight (28) years.

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Q Did you spend any of that time in Meflen Township?

A Yes, sir, I did.

Q Where is Meflen Township?

A Center of Columbus. The next jurisdiction over from where I live now.

Q How long were you a police officer with the township?

A Approximately eight years.

Q What were you duties as a police officer in Meflen Township?

A I was a patrol sergeant.

Q And, how big of a city or township is this?

A It encompasses about ten (10) square miles.

Q How large a police department is this?

A Twenty-seven (27) man.

Q Again, how far is that from Detroit?

A Two hundred and forty-one (241) miles.

Q I take it you know that because you drove?

A I just drove in.

Q I want to take your attention back to January 10th--- I'm sorry, not January 10th. February 20th, or somewhere near the 19th or 20th, 2001.

Were you employed by Meflen Township back then?

A Yes, sir, I was.

Q Did you go at some point in time, in the afternoon, I believe it was January, February of 19th, 2001 to a shopping center because there was a suspect that was being investigated?

A Yes, sir.

Q And, what was it that you were detached to? Why don't you tell me, it would be easier that way?

A There was --- it had been aired that Officer Damschroder had stopped a suspect a vehicle and I believe four people were on board. Three or four people were on board. Had three or four people in custody and one had run.

I was thirty (30) seconds off.

Q So, what did you do?

A As I --- to the best of my recollection Officer Damschroder, by the time I got there had the gentlemen in custody.

He was handcuffed and placed in the rear of my car.

Q And, did you obtain any identification from the person that he had in custody?

A Several pieces of identification.

Q If you could hold of second.

I am showing you what has been marked People's

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proposed Exhibits 19 and 22 (indicating).

Do you recognize those, the top one I believe is People's proposed Exhibit 19, the numbers are on the back.

So, starting with People's proposed 19, do you recognize that?

A The driver's license.

Q Actually it was a non-operator's license?

A Right. Yeah, an i.d. card.

Q Is that one of the pieces of identification that was retrieved from the person in the back seat of the car?

A Yes, sir. Yes, it is.

Q People's proposed Exhibit 20, do you recognize that?

A Social Security card.

Q And, is that one of the pieces of identification you received from the person in the backseat of the police vehicle?

A Yes, it is.

Q People's Exhibit 21---

MR. O'MEARA: (Interposing) I have no objection.

THE COURT: Exhibit ---

MR. O'MEARA: (Interposing) Oh, I'm sorry. I thought it was --- I apologize. I thought he was

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moving.

MR. BILKOVIC: I'm not moving for anything yet. I will.

MR. O'MEARA: Sorry.

MR. BILKOVIC: All right.

Q (By Mr. Bilkovic, continuing) People's Exhibit 21?

A Another piece of identification he had on him.

Q People's proposed 22?

A A birth certificate.

Q Is that something that you recovered from the person?

A Yes, it is.

MR. BILKOVIC: Your Honor, at this time I would move for admission into evidence of People's 19 to 22.

THE COURT: Any objection?

MR. O'MEARA: No, sir.

THE COURT: People's Exhibits 19 through 22 may be admitted into evidence.

Q (By Mr. Bilkovic, continuing) Did you attempt to obtain the name of the individual in the back of the car?

A Yes, I did.

Q What did he tell you his name was?

A Uh --- last name was Reed (phonetic). Aton --- I can't

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pronounce it. Aton Ishia.

Q Aton Ishia Reed?

A Right.

Q The --- People's Exhibit 19, is a non-operator's license. Non-operator's i.d.?

A Uh-huh.

Q What name is on that?

A Aton Isiah Reed.

Q And, is there a picture on that?

A Yes, there is.

Q And, did the picture match the person who you had in custody?

If you remember?
A I really don't remember.
Q The incident happened over a year ago, correct?
A Right. Right.
Q I want you --- more detail.
What state was that issued from?
A Alice (phonetic), West Virginia.
Q Does it have on there the date that it was issued?
A I'm sure that it does.
Twelve (12) fifteen (15) of two thousand (2000).
Q The name, and I am going to need you to say it and then
[Page 52]
spell it for the benefit of the Court Reporter.
A The name is Detniuan, D E T N I U A N. Isiah, I S I A H.
Reed, R E E D.
Q Is there a date of birth on there?
A Four sixteen of seventy-four (4/16/74), of seventy-six ('76).
Q Moving to People's Exhibit 20.
You indicated that was a Social Security card.
A Right.
Q What's the name on the Social Security card?
A The same, Detniuan Isiah Reed.
Q People's Exhibit 21, was that a Social Security card?
A That's a Social Security Card.
Q What's the name on that one?
A Isiah Andrew Abduc Mateen.
Q Could you spell Abduc Mateen?
A A B D U C dash M A T E E N.
Q People's Exhibit 22, what is that?
A Birth certificate.
Q For who?
A Detniuan Isiah Reed, born April 16th, 1976.
Q How much time did you spend with the person?
A It would be a guess.

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Q Well, if you can give me your best estimate. I am trying to narrow it down, was it minutes, hours, or days?
A Total from the time that I left him at the jail?
Q From the time that you eventually learned his identity?
A Hours, two or three hours.
Q From the time you first had contact with him until the time you learned his identity, two to three hours.
A Sir, when I was positive, was given a positive i.d. on him, two to three hours.
Q During that two to three hours, how was this person acting?
A Very calm, very collected. Insisted he was Detniuan Isiah Reed.
Q Did you let him know that you didn't believe him?
A I had suspect --- I --- what I did, was I called him Van.
Q And, what did he do?
A He answered, he said --- he turned around and look and said 'What'?
Q After he did that, is he still indicating he was Isiah Reed.
A Then he quite talking.
Q What did you do then?
[Page 54]
A I had a wanted poster that didn't look like him.
He looks different today than what he did the day I arrested him. Or then arrested him.
Q What did you do with the wanted poster?
Did you notice something on the wanted poster?
A A chain and a cross. Very similar to the chain and the cross that he had on that day.
Q Did you take him somewhere after noticing that?
A At that point when the other agency was involved wanted nothing to do with him.
Q Who was this other agency?
A The FBI.

Q Why didn't they want anything to do with him, do you know?
A They thought he wasn't who he was, because there was quite a difference in the picture.
Q Well, who were you looking for?
A Um ---
Q (Interposing) If I said the name would you remember it?
A Yes.
Q Van Chester Thompkins?
A That's it.
Q And, when you say that they didn't --- he wasn't the person they thought they were looking for. The FBI
[Page 55]
didn't take the person who your had, Van Chester Thompkins?
A Yes.
Q So what did you do after seeing this necklace?
A I believed, and I can only base it on twenty (20) some years of gut experience. I knew I had Van Chester Thompkins. I believed I had him.

The FBI told me that the chain they felt wasn't enough to detain them.
Q What did you do?
A I detained them.
Q Did you take him some place?
A Yes, I did.

In the State of Ohio, which even a visitor bicycling at that time, the law says you can't obstruct a police officer from doing his official business.

When Officer Demschroeder stopped him, placed him in custody, Demschroeder was performing his official duties. When he ran he obstructed Ben.

That is a misdemeanor in the First Degree (1st) in the State of Ohio. I believe I wrote an IOC to my chief that my probable cause for taking him to the Franklin County Jail and identifying him as John Doe was the fact that he had identification that didn't match

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up.

I wasn't sure who I had. He answered to the name 'Van', so I was going to slate him at our jail, which a misdemeanor of the first degree is a slateable offense for Obstruction of Official Business.

Q When you got to the jail was he fingerprinted?
A Yes, he was.
Q Was his identity ascertained?
A Yes, it was.
Q Van Chester Thompkins.
A Yes, it was.
Q Did he ever admit to you he was Van Chester Thompkins?
A Nope, he never did.

MR. BILKOVIC: May I have a moment, your Honor?

(Whereupon a brief delay was had.)

* * *[in original transcript]

Q (By Mr. Bilkovic, continuing) You indicated that he was 'slated', what does that mean?
A Taken to jail. He was going to be jailed and then would have to bond himself out.

But, once I ascertained that he was Van Chester Thompkins I forgot about my charges and a detainer was sent down from Southfield.

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* * * [in original transcript]

THE COURT: Do you want to bring the Jury in?

THE CLERK: Yes, Judge.

(Whereupon the Jury was returned to the courtroom.)

* * * [in original transcript]

THE CLERK: You may be seated.

THE COURT: Would you swear the Witness, please?

THE CLERK: Yes, Judge.

Would you please rise and raise your right hand?

Do you solemnly swear that the testimony you shall give before this Court shall be the truth, so help you, God?

THE WITNESS: I do.

THE COURT: Mr. Bilkovic.

MR. BILKOVIC: Thank you, your Honor.

The People would call Eric Purifoy to the stand.

ERIC PURIFOY

WAS THEREUPON CALLED AS A WITNESS HEREIN, AND AFTER HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH WAS EXAMINED AND

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TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. BILKOVIC:

Q Sir, would you please state your full name and spell your last name?

A Mr. Eric Purifoy, P U R I F O Y.

Q And, Mr. Purifoy, where do you currently reside? Where do you live at?

A (No verbal response.)

Q Where are you staying?

A I's ---

Q (Interposing) Are you incarcerated right now?

A Yes, sir.

Q Where are you incarcerated?

A Ionia Correctional Facility.

Q You are going to have to speak up, I can't hear you.

A Ionia Correctional Facility.
Q And, is that in relation to this case?
A Yes, sir.
Q Sir, how tali are you?
A About five four (5"4').
Q How much do you weigh?
A One eighty-five (185).
Q And, is that about what you weighed back in January,
[Page 72]
2000?
A Yes, sir.
Q Do you know somebody by the name of Myzell Woodward?
A Yes, sir.
Q And, does he have a nickname 'Scoop'?
A Yes.
Q Correct?
A Yes.
Q Mr. Purifoy, you are going to have to speak up, I can barely hear you.
Can you speak up for me?
A Sure.
Q How long have you known Myzell Woodward?
A Maybe five, six years.
Q Would you characterize yourself a friends of Myzell Woodward?
A Yes.
Q And, do you know Van Thompkins?
A Yes, sir.
Q Do you see him in court today?
A Yes, sir.
Q Please point to him and tell me what he's wearing?
A Sitting at the desk right here (indicating) in a tan shirt.
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MR. BILKOVIC: May the record reflect identification of the Defendant, Van Thompkins.

THE COURT: It may so indicate.

Q **(By Mr. Bilkovic, continuing)** How do you know VanThompkins?

A We're acquaintance.

Q Would you describe yourselves as friends?

A Acquaintance.

Q Is there a difference with you between an acquaintance and a friend?

A Very much.

Q In January were you closer to a friend than you are to an acquaintance?

A Yes.

Q And, in January of 2000, would you describe yourself as acquaintances with Van Thompkins or friends with Van Thompkins?

A Well, at this time I have been advised to take the Fifth Amendment Right as far as anything concerning January 10th.

MR. BILKOVIC: Judge, may we have the Jury excused?

THE COURT: The Jury might be excused.

(Whereupon the Jury left the courtroom.)

* * * [in original transcript]

MR. BILKOVIC: May we approach?

THE COURT: You may.

(Whereupon a discussion was held at the Bench, out of the hearing of the Court Reporter.)

* * * [in original transcript]

THE COURT: You may take the Witness down.

(Whereupon the Witness was excused and left the courtroom.)

* * * [in original transcript]

MR. BILKOVIC: Judge, may we approach, briefly?

THE COURT: You may.

(Whereupon a discussion was held at the Bench, out of the hearing of the Court Reporter.)

* * * [in original transcript]

MR. BILKOVIC: Your Honor, could we put something on the record?

THE COURT: Mr. Bilkovic?

MR. BILKOVIC: Your Honor, I just want to let the Court know. I have met with Mr. Purifoy on one occasion and I know Detective Helgert has talked to him on several occasions.

He has indicated to us on those occasions as

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late as I believe Monday of this week --- no, Thursday of last week that he was going to testify and was not going to invoke his Fifth Amendment Right.

I obviously know that as a Prosecutor that I cannot call a witness that is going to invoke the Fifth Amendment. Had I known he was going to do that I certainly would not have called him as a Witness.

I have explained to the Court at the Bench, and I just wanted to make a record.

MR. O'MEARA: And, I don't believe Mr. Bilkovic would have called --- strategically, let alone the fact that I think he is an ethical and honorable man and would abide by all Court Rules, statutes, and law.

But I just think that strategically he wouldn't have done it.

THE COURT: I agree. The fact that his lawyer wasn't even here to notify us obviously he thought the question was decided.

Would you call your next witness, please?

MR. BILKOVIC: Your Honor, I am prepared to call Detective Helgert.

THE COURT: Oh, okay. Then let's bring the Jury in, please?

THE CLERK: Yes, Judge.

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[Q by Mr. Bilkovic; A by Christopher Helgert]

[Q continuing] what purpose?

A Detective Literacki, who was my partner then, he and I were officers managing this case, investigating this case. We were on the east side of Detroit attempting to find people, witnesses, evidence.

While we were in that area we received information that a caller had said that the suspect van in this case, which had been flashed on television as a vehicle we wanted, by description, I believe, oral description was located on Maple Ridge west of Gratiot.

It was winter, it was a cold snowy day. We drove those blocks, looked for the vehicle, never found it. We finally got out on foot and went house-by-house, alley-by-alley and located the suspect vehicle behind the address that you just read.

Q The thirteen seven three three (13733) Maple Ridge address?

A Yes.

Q Were you with Officer Farquhar when you did that?

A Eventually, because Detective Literacki and I were alone, we did, we called for other officers and wreckers.

Officer Farquhar in particular responded because he was an evidence tech and we took pictures to

* * *

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[Q by Mr. Bilkovic; A by Christopher Helgert]

Two captains chairs behind those, a bench seat to the back, behind which was that boom box that I talked about.

Q The description that was given and broadcast, did that description include the back and there was a boom box in the back, a long seat in the back as well as captain chairs?

A I don't think so.

Q Do you know if that van was fingerprinted?

A Yes.
Q And, do you know if there were fingerprints found inside the van.
Q State Police fingerprinted it, and I don't believe so.
Q I show you what has been marked as People's Exhibit 9, do you recognize that?
A I do.
Q And, what is that?
A That is a copy of one of the exposures on the Lou's Deli surveillance tape.

That exposure depicts the Defendant, Van Thompkins, Eric Purifoy, and Myzell uh --- Woodward from left to right, making their way into the delicatessen on the night of this murder.
Q And, do you know what was done with that photograph,
[Page 83]
after it's production?
A (No verbal response.)
Q By that, I mean do you know if it was broadcast?
A It was.
Q After it was broadcast to the outlets, did you have contact with an individual by the name of Eric Purifoy?
A Yes.
Q And, is he located in that photograph?
A Yes, he's the middle individual.
Q Can you tell me how your contact with Eric Purifoy came about?
A We had learned Eric Purifoy's identity and a potential address for him from an informant.

And, that eventually took us to an address on Newport in the same area of Detroit, Hayes-Seven Mile area.

I believe it was Saturday the 15th or Sunday the 16th --- uh --- we actually Detective Literaki and I were in the office and a phone call was received by us from a person identifying themselves as Eric Purifoy, who said he wanted to surrender to us.

Uh --- we made our way to that Newport address, which was an address we had for him, and there we met with his mother, and a neighbor named 'Dottie'.

* * *

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[Q by Mr. Bilkovic; A by Mr. Helgert]
for the opportunity to revisit this?

THE COURT: You may.

Q (By Mr. Bilkovic, continuing) In any event, you had a conversation with Eric Purifoy?

A Yes, sir.

Q And, eventually did Eric Purifoy turn himself in to the Southfield Police Department?

A Yes.

Q How many days after you had that conversation with him did he turn himself in?

A The conversation was either Saturday or Sunday the 15th or 16th of January and he surrendered on --- uh --- I think it was the 19th. It was a Wednesday, so that would be four or five days.

Q And, are you aware of whether or not Eric Purifoy was charged in this case?

A Yes, I am.

Q And, are you aware of what the charges were?

A Yes.

Q What were they?

A He was charged with First Degree Murder, Assault with Intent to Commit Murder, Carrying a Concealed Weapon in a Motor Vehicle, and Felon in Possession of a Firearm, and in addition to that there were two counts of what is

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called Felony Firearm, or Possession of a Firearm in the Commission of a Felony is what he was charged with.

Q As the Officer-in-Charge and the person who presented to the Prosecutor's Office, are you aware of the theory under which he was charged?

A Yes.

He was charged under the theory that he was an Aider and Abettor. And, by that I mean that he did acts to assist in the commission of those crimes and the behavior that --- that made out that Aiding and Abetting was the behavior of driving the van, driving towards the victim's vehicle, stopping, backing up towards the victim's vehicle, waiting while shots were fired at the victims and then driving away with the shooter and the gun in the vehicle.

Q Are you aware of what the verdict was in this well, did he go to trial?

A Yes, he did.

Q Are you aware of ---

A (Interposing) In this court.

Q (Continuing)...what his verdict was?

Was I the Prosecutor or was there another one?

A There was another Prosecutor at the time.

Q And, are you aware of what the verdict was?

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A I am.

Q What was the verdict?

A He was found--- he was acquitted of the crime of First Degree Murder. Acquitted of Assault with Intent to Commit Murder. And found guilty of --- uh --- Concealed Weapon in the Motor Vehicle. Felon in possession, and two Counts of --- well check that.

He was found guilty of Concealed Weapon in a Motor Vehicle.

Q And, after his trial, are you aware of whether or not he pled any charges.

A That's right.

He pled to the remaining three charges, two Counts of Felony Firearm, one Count of Felon in Possession of a Firearm.

Q Are you aware of those pleas prefaced under the Aider and Abetter Theory as well?

A Yes, sir.

Q Are you aware of what his sentence was?
A His sentence was with respect to the Carrying a Concealed Weapon and Felon in possession, I believe it was a six to ten (10), eight to ten (10) years with the Michigan Department of Corrections.

And then there was two years to do up front on

* * *

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[Q by Mr. Bilkovic; A by Mr. Helgert]
[A continuing] the Felony Firearm with the Michigan Department of Corrections.
Q I want to switch gears for a second.

Are you aware --- or, do you know Frederick France, right?
A Yes.
Q How is it that you know Frederick France?
A He was the surviving victim in this homicide.
Q And, you had an opportunity to get to know him, to speak with him over the last two years?
A Yes.
Q Did there come a point in time where you became aware that somebody from the Southfield Police Department had conducted a photographic lineup with Frederick France?
A Yes.
Q When did you become aware of that?
A With respect to the lineup I believe you are talking about it would have been, I think, October of last year.

Just prior to the Evidentiary Hearing.
Q So, October, 2001?
A Yes, sir.
Q And, did Frederick France ever mentioned that to you prior to that?
A No, sir.

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[Q by Mr. Bilkovic; A by Mr. Helgert]
Q Can you go through the efforts that you are aware of that were made to ascertain the whereabouts of the Defendant in this case?
A Once Defendant Thompkins was identified, a warrant was obtained. We scoured the neighborhood that he was known to frequent.

We executed a Search Warrant at a residence of his. We were in and out of party stores, homes, we dispensed wanted fliers in the neighborhood, We spoke with --- we attempted to speak with his then, co-Defendant, with no success at the time.

We spoke with people that we identified that knew him. Uh --- we were in the various computer data basis that we have. The Michigan Secretary of State, out-of-State DMVs, a system called LEIN, which is a law enforcement system that contains missing persons, wanted persons, as well as one called NCIC, which is a nationwide system which essentially does the same thing.

We dealt with people from parole and probation, we looked at documents from other police departments that contained information about him.

I personally contacted the Michigan State Police Fugitive Apprehension Team, there is a Sergeant there named Judy Anderson, who was assigned to assist us
[Page 93]
with that, because even though we are a pretty good sized department, we don't have the resources to be out-of-State, and be throughout the State, and devote multiple bodies to this investigation for a year or more.

That's their role. Judy Anderson conducted investigations in Southeast Michigan, throughout other cities in Michigan that I know of trying to gain information toward the end of arresting this Defendant.

She enlisted the assistance of the Federal Bureau of Investigation in Detroit, in Duluth, Minnesota, in Minneapolis, and in Columbus, Ohio.

Local Federal Agents here caused the generation of a UFAP Warrant, which is an Unlawful Flight to Avoid Prosecution Warrant that is a Federal Warrant which would, one, give them more jurisdiction.

And, two, to give another charge to arrest the Defendant on.

The Columbus Police dealt with us, and dealt with Michigan State Police FAT team. They dealt with the FBI ---

Q (Interposing) You say FAT team, what --- is the that Fugitive Apprehensive Team that Sergeant Anderson was part of?

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A There were efforts made, as I said in Duluth, Minnesota and Minneapolis to locate this Defendant on information that he had been there before and after this murder.

His --- we --- we were in data basis, one is called 'Faces of the Nation' in which all of us would appear if one put my name or your name into 'Faces of the Nation' a host of information comes up about residents, associates, credit, just all sorts of things. None of that panned out.

The Defendant's picture was placed on the Michigan State Police most wanted list on their Web Site on the Internet.

There were wanted flyers sent to Columbus, Ohio agencies. To Minnesota and, I think I said, if I didn't, we pepper that area, Seven Mile and Hayes, Sarasota, Eastwood, Camden, that whole area was posters and party stores. In particular in party stores.

Q with respect to Camden, what was significant Camden?

A It was an address that the Defendant had.

Q Did you have any contact with any of the Defendant's relative on Camden?
A We exercised a Search Warrant on a residence there. That residence was occupied by the Defendant's Grandmother on the first floor, and by --- I believe it
[Page 95]
is a sister or some relative of the Defendant on the second floor.
Q Did you have contact with either of those people?
A Both.
Q Did either of those people give you any information as to the whereabouts of the Defendant?
A Both denied knowing where he was or being able to help.
Q Are you aware --- well, did you ultimately become away in February of 2001, that the Defendant had been arrested by the Meflen Township Police Department in Ohio?
A Yes.
Q On February 20th, 2001, did you go to Columbus, Ohio?
A Yes, to the Franklin County Jail, which is the jail that serves the County that Meflen's in.
Q And, who did you go there with?
A My then partner, my now partner, David Dowling.
Q Is he also a Detective with the Southfield Police Department?
A Yes.
Q What did you do when you arrived at --- there?
A I identified ourselves, got in, we were taken to an interview room.
I think it was on the first floor of that
[Page 96]
detention facility and the Defendant was brought to us.
Q And, could you describe the room that you were in?
A Austere, eight by ten (8X10), door to a hallway. It had a desk in it, several chairs, and sort of a chair that

was sort of like a school desk. It has the arm on it that swings around that you would write on.

Q And, did the Defendant come into that room?

A Yes.

Q Where did he sit?

A In that school chair.

Q And, who else was in that room?

A Myself and Dowling.

Q Did you identify yourself to him?

A Yeah.

We introduced ourselves as to who we were, we were from the Southfield Police. Our names. I think we shook hands.

We looked at his wrist band to identify who he was, asked him who he was, and he said he was Van Thompkins.

Q Are you aware of what are called Miranda Warnings?

A Yes.

Q And, what are they?

A When a person is ---

* * *

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[Q by Mr. Bilkovic; A by Mr. Helgert]

Q How did he appear compared to that photograph?

A His face looked just like this photograph (indicating). With hair on it. I believe at the Preliminary Exam he also had braids. I knew he had brains in every other occasion that I have seen him with the exception of the trial.

Q And, what is different about him at trial than when you saw him previously?

A Well, in all other events, such as the exam, the Evidentiary Hearing in October he had braids in his hair as opposed to having it short. In a wave, combed back, and he had substantial hair on his face.

He is clean shaven today.

Q Now, getting back to the Miranda.

I asked you if you were aware of what Miranda Warnings were, right?

A You did. And I am.

Q What are they?

A A 'Miranda' is the Constitutional Rights that law enforcement is required to give to persons who are in law enforcement custody before any questioning or interrogation.

The basic Rights are one's Right to silence and one's Right to Counsel.

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In the case of the Rights Form that the Southfield police use, and that I used in this case there would be five items enumerated on a piece of paper.

Those being:

"The Right to --- You have the Right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the Right to have an attorney present before and during the times that you answer questions and make statements. And, if you can't afford an attorney one can be appointed for you by the Court before you answer questions and make statements.'

Q The fifth item---

A (Interposing) The fifth item---

Q (Interposing) I'm sorry.

A The fifth items simply says, I'm paraphrasing, but it says, you can exercise your Rights at any time. Stop answering questions of making statements. Or summon an attorney.

Q Now, was it your purpose at that particular time to interview Van Thompkins when you were there?

[Page 101]

A Absolutely.

Q And, prior to conducting an interview with him, did you advise him of his Constitutional Miranda Rights?
A Yes.
Q Is there a system or how do you do that?
A How I normally do it, or how this went?
Q How it went in this case.
A What I do is to place the Rights Form in front of him with a writing instrument.

I asked him ---

Q (Interposing) Just stop right there. I am going to approach and show you what has been marked as people's proposed Exhibit 24, do you recognize that (indicating)?
A I --- I do.
Q And, what is that?
A This is a photocopy of the eight and a half by eleven (81/2xll) piece of paper that contains the Miranda Warning, or the Constitutional Right Warning that I just answered your questions about.

MR. BILKOVIC: Your Honor, at this time I would move for admission into evidence People's proposed Exhibit 24.

MR. O'MEARA: I have no objection.

THE COURT: Exhibit 24 may be admitted into
[Page 102]
evidence.

Q (By Mr. Bilkovic, continuing) Can you explain to the Jury how it was that you went about advising the Defendant of his Miranda Warnings?
A My technique, or at least what I attempt to do is pretty consistent.

The first thing I ask folks to do, and I ask the Defendant to do is read me Number 5 aloud. He did that. The purpose of that is --- it verifies for me that he can read.

I then read him Numbers one through four, or one through five. Rereading five. And I would normally ask,

and did ask him to place his initials by each number as I did that.

That is indicative of the fact that they have been read to him and that he focused on him. He indicated that he wasn't going to write anything on that form. There is a place for a written answer to the questioning, 'Do you understand?' The answer is usually 'Yes.' He wouldn't write an answer nor would he sign, time or date it, as I would have asked him to do.

Q Did you have him read the Number Five off of that form?

A Yes.

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Q Did he read them verbatim?

A Yes.

Q Okay.

And, did he indicate that he understood, if you recall?

A I don't --- I believe he understood it because he appeared literate, and appears --- coherent, reasonable, but I don't think I asked him that question.

Q Did you read him the other Rights on that form verbatim?

A I did, yes.

Q Do you recall asking him at the end of that, if he understood his Rights?

A I don't know that I orally asked him that question. There is a written question there that I addressed asking him, as I said, to initial and sign and write an answer as to understanding or no understanding, but –I don't think I put the question to him orally.

Q Did he ever tell you he didn't understand any of them?

A No.

Q Did he ever ask for an attorney?

A No.

Q Did he ever tell you that he didn't want to talk to you?

A No.
Q What was his demeanor like?
[Page 104]
A Peculiar. Sullen. Generally quiet. He was not especially communicative with us, with me. My partner and I did most of the talking in that interview. I had to direct his attention back to me.

Several times he would look down or look away and I would --- in interviewing somebody, interrogating someone I want to have eye contact. I want them to see me, and I want them. So, I would have to call him back and ask him to, you know, look at me and pay attention. Sometimes I had to ask for answers.
Q How long did you talk to him?
A About two and a half hours.
Q And, you indicated that you and Detective Dowling did most of the talking?
A Most of it.
Q What was the nature of the conversation, what were you telling him?
A Well, the way this interview or interrogation went was we started with a theme, there were a couple of themes that were employed.

Initially the theme was generally that we were there, he was caught for this homicide and before we went back to Michigan and talked to Prosecutors and Judges we wanted to hear his side of what happened,
[Page 105]
there were always two sides to a story.

He didn't provide any reasonable response, any significant response to that.
Q Did he talk --- did he say anything in response with respect to the case?
A Nothing of any significance.
Q Tell you he didn't do it?
A No.
Q Tell you Eric Purifoy did it?
A No.

Q Tell you Myzell Woodward did it?
A No.
Q You indicated
MR. O'MEARA: (Interposing) Your Honor ---
Oh, I withdraw, sorry.
Q (By Mr. Bilkovic, continuing) You indicated that was one theme you tried with him?
A Yes.
Q What next?
A We spoke to him about what --- in view of the fact that he wasn't providing information what did he think would happen?

I remember using the ostrich head in the sand metaphor. 'How do you think this is going to turn out
[Page 106]
for you?' 'You need to help yourself, you need to put forth an explanation.' 'People are going to want to hear from you.'

We incorporated into our discussion with him the fact that Eric Purifoy was under arrest. We gave him disinformation, meaning we told him something that was not true. I told him that Eric Purifoy had ---you know provided information about his involvement and the entire episode.

We told him we had talked to Myzell, or 'Scoop', who I had learned that he knew, as I learned he knew Eric. None --- None of that generated any significant response.

As before he never denied that he did it. He never said that anybody else did it.

THE COURT: Counsel, we are going to break for lunch.

Ladies and Gentlemen of the Jury, remember, do not discuss this case among yourselves or with anyone else.

You are excused until one-thirty (1:30).

Would you lead the Jury out, please?

THE CLERK: Yes, Judge.

(Whereupon the Jury left the courtroom.)

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* * *[in original transcript]

(Whereupon the luncheon recess was taken.)

* * *[in original transcript]

THE COURT: Sir, you may take the stand.

You have already been sworn in again, it won't be necessary to swear you in again, you are still under oath.

You may take the stand.

(Whereupon the Jury returned to the courtroom.)

* * *[in original transcript]

Mr. Bilkovic you may continue.

MR. BILKOVIC: Thank you, your Honor.

CHRISTOPHER HELGERT

WAS THEREUPON CALLED AS A WITNESS HEREIN, AND AFTER HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION (Continuing)

BY MR. BILKOVIC:

Q Detective Helgert, before we left for the lunch break, you were talking about different tacts --- tactics that you were using, or attempting to use with the Defendant.

A Themes and approaches.

[Page 108]

Q Themes and approaches, yes.

You indicated that you switched themes. You were telling the Jury some of the themes that you went through and what transpired.

A Well, I think I may be repeating myself a little from earlier testimony.

Initially we told the Defendant, 'We're hear. You're caught for this murder. We know you have a side, things aren't always as they appear and they are never one-sided. So, this is your opportunity to tell us that we take back to Michigan to show Prosecutors and Judges.'

I know I mentioned earlier that as things progressed or didn't progress I used the metaphor, the old ostrich with his head in the sand metaphor. 'What do you think is going to happen?' 'What do you think the outcome will be if you don't tell your side.' And that wasn't productive.

Q When you say 'productive' what do you mean?

What wasn't productive?

A It --- not only did it not illicit any admissions or denials, for that matter, it didn't really illicit any sort of reaction.

I said earlier, there were several times I had

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to direct his attention back to me to make eye contact with me, just so we could truly converse with one another and see each other. He spent a lot of his time sitting on the --- in that school chair that I described, simply holding his head looking down.

Q While you were---

A (Interposing) To the most ---

Q (Continuing)...while you were talking to him about the case making references to the chair?

A I was just going to say, the --- I remember two things that he did say, he said 'He didn't want a peppermint' that my partner offered him, and 'the chair that he was sitting in was hard.' By way of a complaint.

Q And, was that while you were talking to him about the murder that occurred in Southfield?

A Yes.

Q Did there come a point in time where you made the decision that you were getting close to the end of the interview?

Or discussion, I guess.

A Well, early on in the interview I wasn't very optimistic, but there came a time where in terms of--- Just as the interrogation was nearing an end, there was not much more to say. We had been very repetitive.
[Page 110]

The last theme I employed, which was something I do frequently, it is just appealing to somebody's sense of morality or religion. In this case my question to the Defendant was, 'Do you believe in God?'

Q How did he respond?

A He said, 'Yes.

Q Did his demeanor change at all at that point?

A He made eye contact with me at that point, and he didn't cry. I believe I wrote in my report that his eyes turned glassy or moistened like that, you can look at someone and just when you see those eyes begin to shine a little bit.

My next question to him was, 'Do you pray to God?' And he told me, 'Yes.' And as soon as he said that I said, 'Do you pray to God to forgive you for shooting that boy down?' And he said, 'Yes.' And he looked down.

Q Did he paraphrase that or put qualifiers on that?

A That was --- I think I --- I believe I just quoted the conversation verbatim.

Q Did you give him an opportunity to write down his version of what happened?

A Before that portion of the interview, my partner, Detective Dowling, had pretty theatrically, he picked up
[Page 111]
a blank tablet of paper, gone over, sat it down, took his pen out and laid it down. And he was very close to the Defendant.

And he said, 'Son, this is your opportunity to write down what happened.' The Defendant never touched the pen, never touched the tablet, and that tablet remained in place until the interview was concluded, which was within --- within minutes of the discussion about God.

Q I want to take your attention to March 6th, 2001. Did you have an opportunity to return to Meflen Township?
A Yes.
Q And, were you given any property when you returned to Meflen Township?
A We were given all the property that Meflen Township Police took from the Defendant after they chased him down and arrested him.
Q And, the identifications that were admitted in this case through Sergeant Parrish, were those some of the items that you were given?
A They gave me that from his property. I took them to Southfield's property and I caused them to come to court today.
Q Were you given any clothing that was being worn by the

[Page 115]
[Q by Mr. Bilkovic; A by Mr. Helgert]
[A continuing] We wouldn't disseminate that information simply because we have to hold some information back so when someone brings us information we have some means of checking the validity of the information.
Q With respect to Omar Stevens, are you aware of why he was in the Homicide Section of the Detroit Police Department, when he was interviewed?
A Yes.
Q Why is that?
A He was --- Omar Stevens was arrested on a matter that was not related to homicide in any way. He contacted someone in the Detroit Police Department Headquarters and indicated he had information for Southfield about a homicide.

By virtue of the fact the crime in question was a homicide, that information was then sent to Detroit Police Homicide so that Homicide Unit would contact us.

We dealt with them, they --- by phone. They gave us information as to who and kind of what he wanted and then they arranged to have him transported from their lockup facility, which was on the ninth floor to their floor on the fifth floor, where they gave us an interview room and where we spoke with them.
[Page 116]

Ah --- but --- but --- but his detention in Detroit was not related to any assaultive crime.

Q Did you make any promises to Omar Stevens?

A We never made any and he never asked for a thing.

Q Do you ever appear on his behalf in his criminal case, assuming there was one?

A I haven't seen Omar Stephenson before today since that visit in the year two thousand (2000).

You know, I misspoke. I saw Omar Stephenson yesterday also. After following his presence at the --- ah --the County Jail.

Q And, are you aware of why that was done?

A Absolutely.

Q Would you tell the Jury ---

A (Interposing) Detective Literacki, my former partner, he's assigned out to a multi-jurisdictional task force now, which does many things.

One of the things they do is seek fugitives. Omar Stephenson was a witness that we wanted very much for this trial, because his testimony we believe if absolutely truthful and critical.

And, as he told you today, he didn't want to testify. And he made himself quite scarce. I personally, with my partner now, Dave Dowling, I have
[Page 117]
been to family homes, and been on the street looking for him unsuccessfully.

We asked Detective Literacki and supervisor if they would use their resources to seek him out. They have been doing that for a week. They located --- well,

Tom Literacki, Tom actually talked to him on the phone on Tuesday. He responded to a phone call, blocked the call and Tom told him, you know, what he wanted, and I'm informed that the Witness hesitated a little bit

Q (Interposing) I am going to stop you, because I don't want you to get into any unnecessary hearsay. If I have to I will call Detective Literacki.

Was there a decision made by you and/or Literacki that you weren't comfortable with his assurances that he would be hear today.

A He made that assurance. We don't take anything on faith, it is the nature of our business. That's the nature of the Witnesses involved in cases like this many times.

Even though he said he would be here our direction was clear, if you locate him, lock him up. And the authority for the arrest was just a Material Witness Warrant.

MR. BILKOVIC: Thank you.

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* * *

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[Q by Mr. O'Meara; A by Mr. Helgert]

his discussion about this photo, that he hadn't volunteered the information?

A And what photo are we talking about?

Q The surveillance photo.

Your testimony was that, if I'm not mistaken, that he had, on his own, alerted, sent a message out that the police should contact Southfield Homicide, because he had information on a homicide?

A I can only repeat to you what he said and what the Detroit Police said,

That is, that he told somebody at the Detroit Police Headquarters he had --- he wanted to talk to

Southfield. They put things in place to make that happen.

Q Now, moving along for a minute, did --- this --- this conversation you had, the effort to elicit a confession, this time that you spent with Mr. Thompkins in Ohio, um---

You talked a lot about the techniques you used to --- during this two and a half hour period to elicit information from him, correct?

A Yes.

Q And, you talked about how he didn't cooperate, correct?

A Well, I talked about he didn't respond a lot. I might

[Page 130]

have used the word cooperation.

Q He --- the --- the form you asked him to sign, which he refused to sign, but that he wasn't going to read one of the things on, tells him over and over again, and this was the first thing you did with him when you sat down, correct. Was to go over his Constitutional Rights and Statement Form?

A Right after intros, yeah.

Q The gist of it, and everybody knows what it is, did you tell him repeatedly, 'You don't need to talk to us.' You can sit there and be silent, if you want?

Correct?

A (No verbal response.)

Q That's what the nature of this Warning is, correct?

A Well, that warning is actually two-fold. And, in substance the two issues it involves are, one's Right to remain silent and one's Right to Counsel.

Q And, you understand, because you are a trained police officer and you are sworn to uphold the law, and that is what you do, that the law says that he absolutely does have a Right not to talk to you when you show up even though you drove three hundred and forty-one (341) miles with your partner.

He as got the absolutely --- even after you
[Page 131]
have looked for him for a year, he has got the absolute Right to just sit there and stare at the floor while you talk to him, correct?

A Absolutely.

Q And, you --- when you went over these with him, you never indicated, 'You have the Right to remain silent, but if you do, it's going to be bad news for you.'

You didn't indicate to him in any way, shape or form that he didn't have the Right to remain silent, did you?

A Well, let me address what you just said and did, specifically.

You said, 'You have the Right to remain silent, but and put your fists together (indicating) it would be bad news. '

No, nobody never threatened the Defendant. Nobody ever made a fist to the Defendant. Nobody ever --- nobody, I mean me or Detective Dowling, ever implied any sort of violence or threat, with the except of the threat that he needed to help himself because the potential outcome for him would not be good.

Q The very real threat ---

A (Interposing) Before the Court.

Q (Continuing)...that there's a criminal prosecution
[Page 132]
looming and --- it is a very real situation, it is not a threat, it is just like with smoking you might get cancer. I mean ---

A (Interposing) It's a situation, that's right.

Q And, as a matter of fact, because you understand, you respect the law and you understand the reason for the Miranda Warnings, and you want to get a confession and/or statement, whatever you get is the product of his will and not the product of some threat or coercion when you communicate with him about his Right to remain silent.

Is it fair to say that you do so in a way that actually communicates to him his Right to remain silent and makes real to him that Right?

A (No verbal response.)

Q Do you understand what I'm saying?

You do it in a way in which --- in which --- which reaffirms rather than detracts from --- I can tell you something 'You have the Right to remain silent.' Or, I can say, 'You have the Right to remain silent.' Your tone.

The way you do it indicates it's a real Right, something he has the power and you respect his power if he effects to exercise it, correct?

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A If I understand your question, it deals with the tone of my voice, or the inflection of my voice when I read those.

And, the truth is, no, I am not his advocate. My responsibility, under the law, as I understand it is to make sure he is informed of this Rights. The law doesn't require me to read them, but I do. It is just sensible and logical.

I don't read them with inflection placed in one way or another. I do what the law requires me to do, that is advise him of his Rights.

My person habit is to give him a piece of paper to read along with what I am saying to him.

Q Respected, during the time you talked to him, his absolute Right not to respond to you?

Is that fair to say?

A I believe that is absolutely true, yes.

Q You --- you asked him questions and you used techniques with him which you thought might be helpful to you in making your five hundred (500) mile round trip to Meflen County productive, but you respected his right to remain silent?

A I'm not going to agree with that characterization.

My --- ultimately my role as an investigator

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is to seek truth. I went to Meflen, Ohio and I had a definite idea about what I thought the totality of the circumstances of this murder were.

But, I wasn't there and somebody, anybody who was has things to bring to the table. I am absolutely convinced and was then that your client was there. I would have like to hear what he said.

Yes, if he would have made a complete admission and a complete confession, yes, that would have strengthened the criminal case against him. He didn't make a complete admission or confession. He said the things I said he said.

Q Now, you did go down there and drove two hundred and forty-one (241) miles and didn't tape record the conversation you had with him, is that fair to say?

A That is absolutely right.

Q There are tape recording devices which are available to you as a police officer, is that correct?

A Yes.

Q This was not a spur of the moment trip where you left and rushed down to Ohio, this was a planned trip, correct?

A Planned for about twelve (12) hours.

Q Didn't take any sort of recording device, a video

[Page 135]

camera, any other mechanism. Didn't borrow one when you were down there so we would have some independent record of exactly the context and words that were used when he acknowledged, according to you, that he prayed over this horrible, horrible tragedy that occurred?

You don't have any independent mechanical recording device, correct?

A Well, two issues. One, I didn't use any words like 'horrible, horrible tragedy'.

Q That's only my words.

A And two, it was not electronically recorded in anyway, no.

Q We have just your recollection, not to fault you, because that is your recollection, as a person who has been --- had this --- had Mr. Thompkins had thumbed his nose at you and all your efforts for the past year, we have just your recollection of the exact --- or the subtleties of the words that were used, the exact words that were used when he acknowledged that 'Yes he did prayed. '?

A I'm not going to agree with your characterization that we --- that I felt, or that anybody I know felt he had thumbed his nose at us. He was a fugitive.

I didn't see him, we don't take it personally,

* * *

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[Mr. Kaluzny Continuing]

I understand you don't want to be here, that correct?

MR. PURIFOY: Correct

MR. KALUZNY: You understand you are under subpoena?

MR. PURIFOY: Excuse me?

MR. KALUZNY: You understand you are under a subpoena?

MR. PURIFOY: Yes, sir.

MR. KALUZNY: All right.

Have you made a decision based on all of the advice that you've received whether or not you are going to testify?

MR. PURIFOY: Yes, sir.

MR. KALUZNY: And, what is your decision?

MR. PURIFOY: Yes.

MR. KALUZNY: You are going to testify?

MR. PURIFOY: Yes.

MR. KALUZNY: I am going to remain in Court, your Honor.

THE COURT: Okay.

MR. KALUZNY: Do you have any other questions of me?

MR. PURIFOY: No, sir.

* * *

[Page 166]
[Q by Mr. Bilkovic; A by Eric Purifoy]
A Yes.
Q Is that a yes?
A Yes.
Q When you walked out of the deli, what did you do?
A We went to the van.
Q Who had the keys to the van?
A I did.
Q Why did you have the keys to the van?
A Well, we had made arrangements in the restaurant that I would drive back since, you know, we had some problems getting there.

So --- not problems, but since I had to tell him I was going to drive back.
Q You were going to drive the van back?
A Yes.
Q When the three of you walked out of Lou's Deli, did you walk out of Lou's Deli side-by-side, right in a row?
A Um --- I no, I wouldn't say so.
Q Was somebody in front of somebody else?
A I was in front of. I was lead.
Q You were the lead?
A Yeah.
Q And, when you say you were the lead, when you walked out of Lou's Deli, did you eventually cross the walkway
[Page 167]
there, going into the drive?
A Yes.
Q And, when you did that, who was first?

A I was.
Q Where were the Defendant and Myzell Woodward?
A Couple of feet behind me.
Q Do you recall walking in front of a ---
Do you recall walking in front of a red vehicle that was parked in front of Lou's Deli, or stopped in front of Lou's Deli?
A Park --- I---
Q (Interposing) Do you remember walking in front of a red car?
A Yeah. Yeah.
Q Did you look inside the red car, when you walked in front of it?
A No.
Q You have any problems with the occupants inside the red car?
A No.
Q So, what did you do?
A I approached the van.
Q And, when you got to the van, what side of the van did you go to?
[Page 168]
A Driver's side.
Q When you went to the driver's side, were you in a position at that time to still see the red car?
A No.
Q Why not?
A Because it was behind the van. And it was still moving. It never came to a complete stop at that point.
So --- I mean, if it did, I didn't see it.
Q In any event, when you get to the driver's side of the van, is the van blocking you from seeing the red car?
A In a sense, yeah.
Q Who gets to the van first?
A I do.
Q Who unlocks the doors of the van?
A I do.

Q When you got to the van, did you hear any discussion about anybody in the parking lot?
A I can hear some --- some talking. I can't tell you what was being said through.
Q Could you tell what was being said?
A I couldn't.
Q Could you tell who it was that was doing the talking?
A No.
Q What happened when you got to the van and unlocked the
[Page 169]
door of the van?
A We all got in the van.
Q When you say 'we all got in', you're talking about you, the Defendant, Myzell Woodward?
A Everybody got in the van.
Q Where did you go?
A (No verbal response.)
Q Once you got in the van, where did you sit?
A The driver's seat.
Q Where did the Defendant sit?
A Uh --- if I'm not mistaken, passenger's seat.
Q Front passenger's seat?
A Yeah.
Q Where did Myzell Woodward sit?
A Right behind him in the captain's seat.
Q Right behind Van Thompkins?
A Yeah.
Q So, passenger's side captain's chair?
A Right.
Q What happened next?
A I started the van up. I warmed it up, and I pulled out the parking space headed toward the exit.
Q Was there anything unusual about how you pulled out the parking space?
[Page 170]
A No.

Q Do you remember revving the engine at any point in time?
A Before I pulled it out, it was a rather old model, you know, it was cold, winter time. So I had to warm the van up, yeah.
Q So, you indicated that you started driving out of the lot?
A I headed toward the exit, yeah.
Q And, going toward the exit, does that take you past the Rite-Aid?
A Uh --- that particular exit, yeah.
Q Is that the exit you were going toward?
A Yeah.
Q As you were going past the Rite-Aid, did something happen?
A Uh --- yeah.
Q What happened?
A I seen the passenger of the red car standing outside his car. And he was throwing some gestures, or he was saying something. I can't tell you what. I saw him standing outside the car.
Q So, then what happened?
A Nothing, I kept going.
Q Did you go past the red car?
[Page 171]
A Yeah.
Q What happened when you went past the red car?
A They whether, either him or whoever was the driver. Somebody said something.
Q And, do you know what it was that they said?
A (No verbal response.)
Q What happened next?
Let me ask you this. Who started this
You testified in this case in your own trial, back in August or July of two thousand and one (2001), or two thousand (2000)?
A Correct.

Q Did you ever testify that somebody in the red car said something to you?
A I didn't --- I'm not saying he said anything to me.
Q In any event, your recollection somebody in the red car said something?
A Yes.
Q Did Van Thompkins do anything in response to that?
A No, he said, 'He said something. Stop. ' That was it.
Q Well, that's something.
A Yeah.
Q Van Thompkins say something to you?
A Yeah.
[Page 172]
Q What did he say?
A He said, 'He said something. Stop. '
Q Did he say it just like that, or was he a little more animated?
A Excuse me?
Q Did he say it in the voice tone that you are using right now, 'Hey they said something. Stop.'
Or did he do it differently then?
A I mean I he said, you know, I didn't have no ---I couldn't tell whether there was a problem or did he know him.
So, if that is what you want to know, by the tone in his voice, no, I couldn't you know.
Q Okay.
A I couldn't distinguish whether there was a problem or not, no.
Q So, you don't know why he is telling you to stop. In any event, what did you do?
A I stopped.
Q Were you ahead of the red car at this point?
A Correct.
Q What did you do then?
A I backed up to the red car.

Q When you backed up to the red car, how was it that you
[Page 173]
guys were lined up?
A Side-by-side. Pretty much.
Q Passenger door on your van lined up with the driver's door on the red car?
A No, I wouldn't say lined up, we were side-by-side --tip --- well ---
Q (Interposing) Close to each other though?
A I guess so, yeah.
Q When you did this, did you know that Van Thompkins had a gun with him?
A When I backed up?
Q Yes.
A Did I know he had a gun?
Q Yes.
A No.
Q Did you even see a gun on him at all up to that point that evening?
A No.
Q Did you have a gun?
A No.
Q Do you know if Myzell Woodward --- had you seen Myzell Woodward with a gun?
A No.
Q When you backed up, what happened next?
[Page 174]
A When I backed up, I put the car back in drive, my foot on the brake, and I heard --- I heard somebody saying something so I turned the radio down.

And almost instantly after I heard the radio down I heard shots.
Q Could you tell where the shots were coming from?
A No.
Q Could you tell what Van Thompkins was doing at that point?
A Well, I ducked down, he ducked down.

Q Van Thompkins ducked down?
A Yeah.
He ducked back up.
Q Did you ever testify in your trial that Van Thompkins ducked down?
A Yeah.
Q You did?
A Yeah, if I recall, yes.
Q Okay.
We'll get to that later.
A Okay.
Q Do you recall testifying in your trial that after you backed up Van Thompkins turned his back to you?
A Yeah. His back was to me.
[Page 175]
Q Okay.
He did that?
A Yeah.
Q And then you indicated, you indicated that he did that, is that what happened?
A (No verbal response.)
Q After you stopped the car, did Van Thompkins turn his back to you?
A Yeah. He was looking out --- he was looking out of the van, yes, his back was to me.
Q How long after you saw him turn his back to you did you hear shots?
A Well, I thought when I backed up and I reached to turn the radio down I heard shots within seconds.
Q What did you do after you heard shots?
A I ducked down in my seat, half on the floor, whatever.
Q Could you tell how many shots were fired?
A No.
Q More than one?
A Yeah.
Q More than two?
A Maybe four, or five maybe.

Q You're obviously not counting, you just know it is more than one, correct?
[Page 176]
A It was quick. I can't tell you exactly how many.
Q Prior to the shots, do you remember Van Thompkins saying anything to the people in the other car?
A Uh --- Well, it's possible. He might have said, 'What's up?' Or, 'What you say.' Or something like that, yeah.
Q Did you hear anything other than the shots when you heard the shots?
A If I recall, I heard somebody scream, or something like that, yeah.
Q There comes a time when the shots stop?
A (No verbal response.)
Q Yes?
A Yeah.
Q How much time elapsed between the first and the last shop?
A (No verbal response.)
Q And, by that, I don't mean a second. Was it quick or was there a period of time?
A Very quick.
Q After the last shot happened, what did you do?
A I got back in position in my seat.
Q Could you see Van Thompkins at that point?
A Could I see him?
[Page 177]
Q Yes.
Did you see something in his hands?
A Well, it was a gun --- yeah.
Q Do you know what type of gun it was?
A No.
Q Do you know the difference between a revolver and a semi-automatic?
A Yeah.
Q Was it a revolver or a semi-automatic?

A It was an automatic, kind of small, black.
Q Didn't have the cylinder up front, correct?
A Exactly.
Q Did the Defendant say anything to you after the shots ended?
A Well, I don't know if was actually the shots, or during the shots. But he asked me, 'Why was I sitting there.
Q Do you recall testifying during your trial that after the shots he told you, 'What the hell you doing? Pull off.'?
A Yeah.
Q And, is that accurate? Is that what he told you?
A Yeah.
Q So, what did you do?
A I pulled off.
[Page 178]
Q Did you pull off immediately --- by 'pull off' you mean drive off, right?
A Yeah.
Q Did you pull off --- drive off immediately?
A In a sense, yeah. Not in a --- not in a hurry. There was a lot of people in the plaza, you know, cars. You know it was a lot of commotion going on, so I didn't just, you know, hit the gas and all.

I pulled off rather slow.

Q Pulled off slow?
A Very slow.
Q Didn't want to draw attention to yourself?
A No.

I didn't want to run anybody over.

Q That would draw attention to yourself, wouldn't it?
A That would hurt somebody. And I didn't want to do that.

There was people running, you know. Taking cover or whatever, just like I said in my trial.

Q Did you stop to see if anybody had been hurt as a result of his shots?
A As far as in the van or .
Q Outside of the van?
A No.
[Page 179]
Q So, what did you do next?
A I pulled off slowly --- well, there was a few seconds --- I pulled off slowly and stopped.
Q Stop at the exit?
A Yeah.
Q What did you stop at the exit?
A Because there was a stop sign there.
Q And then what did you do?
A I waited for traffic and I pulled off into traffic.
Q Where did you go?
A I went home.
Q Did you go back to your house with Van Thompkins?
A Yeah.
Q Myzell Woodward still in the vehicle?
A Yeah.
Q Van Thompkins say anything to you about what had just happened?
A No.
Q Did his demeanor change at all?
A I mean he --- yeah.
Q How?
A I mean --- the same, you know, he was --- I was riled up, he was, you know, --- you know, his tone was different.
[Page 180]
On the way home he --- we didn't talk, so ---
Q (Interposing) Why didn't you talk?
A Why didn't we talk?
Q Yes.
A I turned the radio up when I headed out of there.

Once I got to the freeway, as I got on Greenfield and, let me see, minutes later while I was on the freeway then I just say maybe I speeded over then, so --- we got home pretty quick.

Q Let me ask you this, you just heard shots, okay?

A Okay.

Q You had to dive down, Van Thompkins had to dive down to the floor, did you see a gun in his hand, do you ever ask him anything on the way home?

A No.

Q Just happened, why not?

A Well, for whatever reason at the time I did not.

Q Do you remember testifying at your trial that one of the reasons you didn't want to because Van Thompkins demeanor had changed, he was acting different?

A I mean, yeah. I mean, I was too.

Q So, you go back to your house.

What happens at your house?

A I get my car and leave.

[Page 181]

Q Where did you go?

A I went home.

Q I thought you were at home when you started?

A Yes. I went to another residence of mind.

Q Did you go where Brenda Field was?

A Um --- yeah, I would say that.

Q Did you see Brenda Fields that night, after you saw what happened?

A No.

Q At this point, did you know whether or not anybody had been shot in the parking lot?

A When I got home?

Q Yes.

A No.

Q Never crossed your mind, though, that somebody could have been shot in the parking lot in Southfield?

A I mean, it did --- my concern was that I wasn't shot.
Q Pardon me?
A My concern was that I wasn't shot. But, yeah, it was a concern, yeah.
Q After that day, did you ever see --- or after that evening, did you ever see Van Thompkins again?
A No.
Q Have you spoke to him, since?
A No.
Q And, you still maintain a relationship with Brenda Fields?
A Yes.
Q Now, a day or two after the shooting, did you see a news story that had your picture on it?
A Yes.
Q I am showing you what has been marked as People's Exhibit Number 9 (indicating). Do you recognize that?
A Yes.
Q What is that?
A It's the Lou's Deli video photos, I guess.
Q The first person on the left hand side (indicating) who was in there? Who is that person?
A The first person on the left hand side, that's Van Thompkins.
Q Whose the middle person?
A That's me.
Q And, who is the last person (indicating)?
A That's Mr. Woodward.
Q Where were you at when you saw the news story that had your picture in it?
A I don't know.
Q You don't remember?
[Page 183]
As a result of that, did you eventually contact the Southfield Police Department?
A No, not as a result of that, no.

Q Did you contact the Southfield Police Department?
A No.
Q Southfield Police Department contact you?
A Yeah.
Q How was that done, if you know?
A I have no idea. Well, I know that Mr. Woodward was arrested and I was told, hearsay, that I guess he gave them my number so they called.
Q They got a hold of you?
A Yeah.
Q And, do you remember them getting a hold of your through your mother?
A Yeah.
Q And, did you speak to your mother?
A Yeah.
Q And, were the police there, also?
A Yeah.
Q Detective Helgert was there?
A Yes, sir.
Q This was over the telephone, right?
A Right.
[Page 184]
Q Detective Helgert and do you remember Detective Literacki?
A Yeah.
Q Detective Helgert, Detective Literacki are with your mother and she is talking to you on the phone?
A Right.
Q Did you hire an attorney at that time?
A Well, at that time --- well I had a retained an attorney, but not to put his --- naugh, I hadn't hired an attorney to put
Q (Interposing) Had you talked to an attorney when he got hold of you?
A No.
Q What happened when they got hold of you?

A They asked me to make arrangements to meet and I said, 'Fine.' I said I was on the other side of town, you know I'll meet you.

They said --- I said, 'A half hour.' And he said, 'An hour. ' And I said, 'Fine.'

Q Did they tell you why they wanted to meet you?

A Uh --- concerning the case. They didn't say detail, no.

Q Did you indicate to them what happened at that point?

A No.

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Q Did you give them any details about what happened?

A About what happened?

Q Your involvement, did you tell them about your involvement?

A Uh --- actually, I don't remember. If I did, I don't remember that.

Q Do you remember telling them, 'I was there, but I wasn't the shooter.'

A I might have.

Q Do you remember giving them the name Van Thompkins?

A Well, I remember telling them --- I remember she --- my mother asking me --- I remember telling her they said, 'Van Thomas'. I said, 'No Van Thompkins.'

Yeah. Yeah. They asked me was his name and I said, 'Yeah.'

Q You told them Van Thompkins, they had him as something else?

A Well, she had --- I guess it was just a misunderstanding with her, I don't know.

Q Okay.

Did you end up making the meeting you had scheduled with them an hour later?

A No, I didn't show up.

Q Why not?

[Page 186]
A I don't remember why, but I wasn't able to make it.
Q Well, it's a fairly important meeting, correct?
A Well, --- excuse me?
Q Fairly important meeting, correct, you know they want to talk to you about?
A Yeah. But, you know, I had other issues, you know, before I had --- you know, I didn't want to meet them alone. So.
Q Did you want to have legal representation before you went in and met him?
A Yes, sir.
Q Is that one of the representations you didn't meet with them that day?
A Yeah.
Q Did you eventually hire an attorney in this case?
A Yeah.
Q How many days later, if you remember.
A Maybe the next day. It might have been the next day.
Q After meeting with your attorney, did you eventually turn yourself in to Detective Helgert?
A Uh ---
Q (Interposing) You and your attorney.
A After I got with my attorney I well, I was told I was going down for questioning and I was arrested, yeah.
[Page 187]
But --- yeah, basically yeah.
Q And, at that meeting you didn't make any statements or participate in any interviews with Detective Helgert, right?
A No.
Q Is that a no?
A Yeah. I made no statements at all, yes.
Q What happened after you turned yourself in?
A I was charged --- I was arrested and charged.

Q And, was one of those charges First Degree Murder?
A Yeah.
Q And, the allegations, if you remember were that you aided by driving the car during the course of the murder?
A Later on it came out, yeah. In District Court, but at the time from my understanding I was --- it was just Murder, First Degree Murder.
Q Do you know why you didn't find out until District Court?
A Well, I didn't find out that I was only --- it was Aiding and Abetting until District Court, yeah.
Q And, you ended up going to trial in this courtroom, correct?
A Correct.
[Page 188]
Q What happened at your trial?
A You mean the outcome?
Q Yes.
A I was acquitted of the Murder charge and found guilty on Weapons Charges.
Q And, you have been sentenced, correct?
A Yeah.
Q And, how many years sentence did you end up getting?
A Six years.
Q Six to ten (10) years total?
A Yeah.
Q Do you have an appeal pending with respect to your case?
A Yes, sir.
Q Now, you are aware in this case that you don't have to testify without a Grant of Immunity, correct?
A Well, if --- I was aware of that, yeah.
Q And, in fact, you have not been given immunity in this case, correct?
A Well, to my understanding I was. I --- no.

Q Who gave you that understanding?
A Well, I was told that that was the next procedure behind me asserting my Fifth Amendment Right.
MR. BILKOVIC: Judge, I would ask that the Court would take judicial notice the Witness has not
[Page 189]
received immunity.
THE COURT: The Court will take judicial notice.
Q (By Mr. Bilkovic, continuing) Have any promises been made to you as in respect to your testimony in this case?
A Promises?
Q Yes.
A No.
Q Do you recall there being discussion, however, that a letter would be sent to the Department of Corrections indicating that you were cooperative in testifying?
A Yeah. That was said here.
Q After this Murder, after the shooting took place, you eventually found out there was a boy that had been shot and killed, correct?
A From news I knew somebody was shot at.
Q Did you attempt to leave the State after you found out about that?
A No.
Q Did you attempt to change your identity after you found out about that?
A No.
MR. BILKOVIC: Your Honor, may I have one

* * *

[Page 196]
[Q by Mr. Bilkovic; A by Mr. Purifoy]
[Q continuing] got me " And I'll use a quote.
"...F'd up. We innocent, dog."
A Yeah, I wrote that.

Q When you wrote to Van Thompkins and said, "We innocent, dog."

What did you mean by that?

A Yeah, I wrote that.

Q What did you mean by that, "We innocent dog."

A "We innocent."

Q Yes.

A Exactly what it says, 'We innocent.'

Q You don't think you did anything wrong?

A I mean what I think is irrelevant, but you know, I didn't see him shoot anyone. So, you know, all I know --- I know the news say, I know what the charges, I know what was said.

Q You didn't see him actually shoot the gun --_

A (Interposing) No, I did not.

Q (Continuing) that fired the bullet, that killed Sam Morris?

A No, I didn't.

Q And, as far as you know, these guys were shooting at you?

A Exactly.

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Q The next letter, July 4th, two thousand and one (2001), People's proposed Exhibit 26.

Do you remember writing that letter expressing some disappointment and some anger at Van Thompkins because his family was calling you a 'snitch and a rat'?

A That's in this letter?

Q Let me give you the exact quote:

"I don't appreciate at all because what you all fail to realize I got kids and family out there and giving me that rat label was hazardous to their health and mine."

Do you remember writing that?

A I'm trying to find it.

Q I'm sorry. I think it is on page one.

A Um --- Oh, yes, I see it, yes.

Q Okay.

His family was calling you a 'snitch' weren't they?

A Yeah.
Q You did not appreciate that?
A Well, I mean, seriously --- seriously, I mean, I can't say anybody said anything.
Q But, in any event, you had some ideas that they were so
[Page 198]
you wrote Van Thompkins a letter saying,
'Wait a second, you're labeling me a rat and that's a bunch of crap.'
Do you remember that?
A Yes.
Q And, you also wrote in that letter;
"Jay, if you want a copy of my trial transcript . "
And, in that trial transcript you testified that he gun, right?
A Well --- yeah, that 'we' had a gun.
Q But, that he's the one that you saw with it, and he was the one sitting in the front passenger's seat?
A Yeah.
Q And, you wrote to him;
"Jay, if you want a copy of my trial transcript you can have that, because you and your family got me f'd up. I haven't done shit to deserve that label."
Correct?
A Correct.
Q Indicating to him you haven't snitched on him, correct?
A (No verbal response.)
Q The next letter, People's Exhibit 27, proposed Exhibit

* * *

[Page 201]
[Q by Mr. Bilkovic; A by Mr. Purifoy]
A Does he write letters after that?
Q Yes.
A Yeah.

Q And, as a matter of fact, you acknowledge one of his letters in August 16th, two thousand one (2001). One of the letters you have up there, People's proposed Exhibit 28th.

"I just got your kite home boy, and I can say it felt good to hear from you."

Right?

A Yeah.

Q So, when he was writing you letters, these were not threatening letters, he's communicating with you, like a friend would communicate?

A (No verbal response.)

Q Right?

Is that true?

A I would think so, yeah.

Q Knowing all of what he knows he is still writing you back, no problems at all, correct?

A Yeah.

Q Does he write in any of those letters, 'Eric Purifoy, what are you doing, you know I was driving, you were the passenger. You shot him.'

[Page 202]

Does he put that in any of those letters?

A Well --- not in those particular words, no. But, he did put in there, you know, that he was innocent.

Q I understand that.

But, did he ever say, 'Eric, what are you doing to me. You testified you were driving. You know I was driving.'

Did he ever put that in a letter that he writes back to you where you respond it was good to hear from you.

A No. Not that I can remember. But I don't remember everything that was in letters either. Because ---

Q (Interposing) I understand.

A (Continuing) . but I don't remember that, no.

I don't remember have the stuff in these letters (indicating), so

Q And, in that letter on August 16th, two thousand and one (2001) you wrote:

"I sat in OCJ for ten (10) months before that --- before they realized I was innocent just like you."

A Did I write that?

Q Yes.

You don't dispute you wrote that, right?

* * *

[Page 205]

[Q by Mr. Bilkovic; A by Mr. Purifoy]

Q And, nothing in this letter that you write back to him is animosity or anger towards him, right?

A Well, I haven't read the letters, but ---

Q (Interposing) Well, do you want to take a minute to ready it?

A (No verbal response.)

Q Or, would you agree with me and trust me that there is nothing in there that indicates that you were angry or that he was angry at you?

A I would say that, yes.

I mean, there was a point where it was angered at, but by the time this letter was out it was --- everything was everything was fine.

So, yeah

Q (Interposing) As a matter of fact, you write in that letter, on page one that;

"Anyway dog, it felt good to hear from you."

Right.

A Okay.

Q In that letter, you also give him some trial strategy, don't you?

A Trial strategy?

Q Yes?

[Page 206]

A (No verbal response).

Q What does this mean to you, that you wrote, let me quote what you wrote;

"I wish I was down there with you right now so you could feel me, not just hear me and maybe S H I T wouldn't be so F'd up like it is and I could put you up on a script I ran on them ho's after dog flipped mode."

Is that accurate, is that what he wrote?

A Um --- well, after he flipped mode, yeah.

Q Okay.

After he flipped who?

A 'Flip mode. '

Q What's 'flip mode"?

A Change of mood.

Q "Because it is some key points in it that you and your coach need to focus on."

Who were you referring to when you said 'coach"?

A Well, this right here where it say uh --

Q (Interposing) I'm just asking you who you were referring to when you said 'coach"?

[Page 207]

A (No verbal response.)

Q Talking about his lawyer, aren't you --- and I --- and your Honor, I want to preface this, I don't mean to imply anything that Mr. O'Meara did in this case.

I'm not meaning ---

A (Interposing) Well, I'm trying to read the letter so I can tell you.

Q Okay.

Go ahead and read it. Tell me when you are done.

(Whereupon a brief delay was had while the Witness read the Exhibit.)

* * *[in original transcript]

A Yeah. Yeah, I would say yeah. I would say that was the way, yeah. It would say that would be the way, yeah.

Q He points in it that, 'You and your coach need to focus on --- I know you've read it.'

Correct?

A Yeah.

Q Top of page two, you indicate that, 'You left the basketball' --- in any event, you know --- and it is true that you know that your letters are somewhat monitored by the Department of Corrections and the
[Page 208]
Oakland County Jail, correct?
A Well, I didn't --- I didn't care. I would have ---
Q (Interposing) I understand that. But, you know that, right?
A I mean it is --- I was told that, but ---
Q (Interposing) And, in a matter of fact was one ---
A (Continuing) it wasn't an issue, no.
Q Well, in one of the letters that you send to Van Thompkins you tell him that they rejected some of the stuff that you sent back to me.
A I didn't know what it was. They done said it was some gang material, but I know that wasn't true.
Q Okay.

But, you know in any event somebody is going through the mail?
A Well, I didn't know they read it, going through it as far as checking for drugs or whatever.
Q I understand that.

You indicated you left the basketball

"I left the basketball court open for your play if you'd feel me. He told me what plays to do and not to do. Like when I---And I am not going to use the word.

"And I hit the floor."
[Page 209]

What did you mean by that?

You're talking about your attorney telling you to say in your trial you hit the floor, correct?
A No. I can't say that is what I'm saying.
Q That's not what you are saying, when you say,

"I left the basketball court open for your play, if you feel me, he told me what plays to do and not to do. Like when a N-I-G-G-A hit the floor."

That's not what that means?

A What did you say it means again?
Q What you are saying is, your attorney told you to testify that you hit the floor?
A No, that's not what I am saying.
Q You go on an say;

"Like when a N-I-G-G-A hit the floor and why because of what I thought. We didn't want to catch them balls from the other team."

You wrote that, right?
A Yeah.
Q And, by that, you are similar in what you're saying here today. You didn't want to be --- testify --- you didn't want to catch gunshots from Samuel Morris and Frederick France, who were in the other car?
[Page 210]
A (No verbal response.)
Q Correct?
A That's what you say.
Q I'm asking you if that is what that means?
A Naugh.
Q Then tell me what means, "We didn't want to catch them balls from the other team."
A Well, at the time I can't really --- I mean, I can't tell you exactly what I mean. It was, you know, stating issues of, you know, some of the stuff that was arising so we were talking.

So, you know, I can't tell you exactly what that mean.
Q Now, let me ask you what this means;

"Bird, you've got to see it like I'm saying to become a winner in this game. Dog. I know you read it by now,,..."

By that you are talking about your trial transcript, right?

"I know you read it by now?"

Right?
A And that's in this letter?
Q Yes.

A Just keep reading out of page two.
[Page 211]
"I know you read it by now?"
A Page two you talking about?
Q Yes, page two.
A Yeah, I see that.
Q Okay.
"You got to read it with the big picture, Dog. "
You're talking about your trial transcript, right?
A (No verbal response.)
Q Van Thompkins has to read your trial transcript, right?
A Yeah.
I mean, that's not what it say here.
Q I understand that. But, what did you mean when you said, 'You got to read it.' What does he have to read?
A I mean --- I can't --- I can't --- I have to read the whole --- I can't tell you exactly word-for-word what I meant.
Q Take your time to read it.
A I'm --- I'm saying because of this old letter and it was--- there was issues arising, so you know, I had some things to say, you know what, and so, you know.
Q And then you say,
"You've got to read it with the big
[Page 212]
picture dog, like why we --- 'why we' --- hit the floor. We didn't want to play and they was, or at least we thought they was throwing balls at us."
What does that mean?
A What do it say?
Q I don't know what that means, I'm asking you. I didn't write it. What does this mean,
"That we have to hit the floor because we thought, at least, that they were throwing balls at us."
A (Lengthy pause).
You say what did I mean?
Q Yes.

A It means we didn't want to catch the balls from the other team.
Q What balls and what team?
Are you referring to gunshots from the red car?
A I mean --- you can take it like that, but that's not what was being said there.
Q What did you mean then, you wrote it?
A I can't --- I can't --- I don't recall what I meant when I said that.
[Page 213]
Q Would you agree that somebody else
A (Interposing) It's been awhile.
Q (Continuing) might read it that way?
A You might read it, somebody in a coach's position might read it different too.
Q Well, you know, you wrote it. Tell the Jury what it means?
A It's been awhile and I --- I can't ---
Q (Interposing) If I gave you more time to digest it, would that help?
A I mean, I wrote letters since I've been here, you know, that I feel different about, or --- or, you know. I mean, it's all about the time and moment.
You know, I wrote this letter, you know what I'm saying.
Q We'll move on.
A Okay.
Q Who's 'Scoop'?
A Scoop?
Q Scoop. Who's Scoop?
Who do you know as Scoop?
Myzell Woodward, correct?
A Yeah, he go by Scoop.
Q And, you write in there, after you indicate;
[Page 214]
"Or at least we thought they were throwing balls at is, it ain't no telling what that dog with the braids did."

In parenthesis Scoop.

"He was by the window. You feel me, dog? read that shit right."

A Right. Okay.

Q Leaving open the opportunity and hinting to him either the defense that they shot at us and you hit the floor or blame it on Myzell Woodward?

A I mean you can take it like that.

Q Is that what you meant?

A No.

Q And, these letters are addressed to Van Thompkins, your so-called just acquaintance?

A Yeah, that's what the envelope said there.

Q And, in those letters where you describe him as an acquaintance you detail things that you guys did growing up together and how hard this is to be away from him, correct?

A It's possible.

Q And, he's writing you back and he never writes back to you and says, 'Eric, what are you doing me? You know I was driving the car and you know you had the gun.'

[Page 215]

He never does that, does he?

A Actually he never said anything about the case in any letter to me.

So, yeah, no, he never said that.

Q Let's talk about Myzell Woodward a little bit longer.

You know that Myzell Woodward is on the hook, for some other crimes right now, don't you?

A Yeah, that's what they say. I don't know that.

Q Okay.

You know that he has been charged --- he is being looked at with respect to a murder in Ohio, where he faces potentially the death penalty?

A I mean, that's what they say.

Q And, in the letter you wrote to Van Thompkins in November of two thousand and one (2001), you would tell Van Thompkins:

"Bird, he is some S H I T. I know for sure he can't get out. So my thing is that he should step up and tell the truth about everything, you dig?"

A Yeah. I wrote that.

Q What did you mean by that?

A I mean that --- meaning that he should take responsibility for whatever he did.

[Page 216]

Q He should take responsibility because he's already done for.

A Not for this. It's take responsibility for whatever he did.

Q Take responsibility for what he did in some other case, or are you talking about this case?

A I'm not sure because --- well

Q You didn't see him ---

A (Interposing) This is what, November?

Q You didn't see him with a gun that night, did you?

A No.

Q Windows in that van wasn't blasted out where he was sitting after the shooting, correct?

A No windows was blasted out, no.

MR. BILKOVIC: I have nothing further.

THE COURT: Mr. O'Meara.

MR. O' MEARA: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. O'MEARA:

Q Hi, Mr. Purifoy.

Before you testified at your trial, you came up with this story about what happened that night when you see--

MR. BILKOVIC: (Interposing) Judge, I am

* * *

[Page 226]
[Q by Mr. O'Meara; A by Mr. Purifoy]

MR. O'MEARA: I'll withdraw the objection. I appreciate the objection.

Your testimony put Van Thompkins in the passenger's seat, right?

A Yes.

Q Frederick France's testimony, his testimony puts Van Thompkins in the passenger's seat, correct?

A I don't remember what Frederick France's testimony was.

Q Your coach had told you what play to make, correct?

A What?

Q You're lawyer?

A My who?

Q You're lawyer, your lawyer? You had a head coach in your case, didn't you?

A No, I hadn't.

Q You had --- but, you did have two lawyers, right?

A Yes, sir.

Q And, you had a lawyer --- a boss lawyer and an assistant lawyer, didn't you?

A I ---

Q (Interposing) Were your lawyers equal, was it like a dream team, everybody did a little bit?

MR. BILKOVIC: Your Honor, I will object. I think we are getting a little maybe Hollywoodish here,

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and I would object to the characterization.

MR. O'MEARA: Well --- I will withdraw the characterization.

Q (By Mr. O'Meara, continuing) Well, did it appear to you, during your trial that either of your attorneys carried and equal burden during your trial?

A Did it appear to me that they did?

Q Did you have one attorney in charge of your case and one attorney helping that attorney?

A She was more Co-Counsel, yeah, I would say that.
Q And, he was the trial Counsel, head Counsel?
A Yeah. I would say that.
Q But, yet, when you talked about the play that your head coach put you up on, you're talking about something wholly different then when you're talking and I want to because it was all chopped up, and you don't seem to remember what it meant and Mr. Bilkovic, when he read it it was all chopped up.

And it has been admitted so I think the Jury can reason them for themselves, but I just want to get -- I want you to tell me what, on earth, does this means? What on earth this could possibly means besides

"My attorneys told me what lie to tell. They told me how to beat the case, what story to
[Page 228]

tell, and let me put you up on that story now, Mr. Thompkins to make it up to you for having spit on you at my trial."

Tell me what else that means?
A Well, that's not what that means.
Q Well, tell me.
A I don't feel like I have to make up anything to nobody.
Q Tell me what this means?

"I wish I was down there with you,..."
And this is nine nineteen (9\19) Mr. Bilkovic.

"I wish I was down there with you right now so that you could feel me. And not just---something, hear me."

And I am going to swear, if it is okay with the Court.

"And, maybe shit wouldn't be fucked up like it is. Then we could put you up on --- then I could put you up on that script that I ran on them Ho's after dog flip mode, because it is so key, because it is some key points in it that you and your coach have to focus on.

I know you read it. And, by now basketball court open for your play, if you feel me. He told me what plays to do and not

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to do, like when the Nigger hit the floor and why, because of what I thought.

We didn't want to be --- we didn't want to catch those balls from the other team. Do you feel me, Bird? You got to see it like I'm saying it to become a winner in this game.

Dog, I know you read it by now what you feel --- what you feel about what I said at my team meeting. You've got to read it with the big picture dog, like why he hit the floor. We didn't want to play and they was -- or, at least we thought they was throwing basketballs at us.

And ain't no telling what dog with the brace is, Scoop, he was at the window. Do you feel me? Dog, read that and write, please.

And that shit you said about them, rap lines put in the script on them freak Ho's. It's one hundred (100) my Nigger and that's for real."

And I apologize to everybody both for my bad accent and the words I have used.

What does that mean, besides here's the story

[Page 230]

A (Interposing) It means exactly what it say.

Q (Continuing) Here's the lie my lawyer told me to tell.

A No.

Q Here's how you tell that lie?

A That's not what it means.

You got the paper, that's what it means.

Q It means that there is some basketball game going on and you've got to get down on the floor because they are going to throw basketballs at you?

A You got the paper.

Q And there was some guy named Scoop was involved in the basketball game who spit something and he was by a window during the basketball game?

A You got --- you got the letter.

Q Yep.

This is your honest testimony here, under oath is that --- that's what you meant in this letter?

A I meant what is on the paper, that's what I mean. You can say what it means in your distinguish, but I meant what was on the paper.

Q Now, the mother of your child, Brenda is Van Thompkins cousin, right?

A It's only fair, yes.

STATE OF MICHIGAN
IN THE SIXTH JUDICIAL CIRCUIT COURT
COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

VERSUS- File No. 2001-178216-FC

VAN CHESTER THOMPKINS, JR.,
Defendant.
_____/

TRIAL

Proceedings had in the above-entitled matter, held before the **HONORABLE RICHARD D. KUHN**, Judge of the Sixth Judicial Circuit Court, County of Oakland, on May 17th, 2002 (4th day).

APPEARANCES:

MARK BILKOVIC
Assistant Prosecuting Attorney
Appearing on behalf of the People

CORBETT O'MEARA
Attorney-at-Law
Appearing on behalf of the Defendant

* * *

[Page 12]
[Mr. O'Mera continuing] I would simply ask to preserve that motion.

THE COURT: You may.

MR. O'MERA: And, I would call Officer Vida.

THE COURT: All right.

Would you swear the witness, please?

THE CLERK: Yes, Judge.

Ma'am, **Do you solemnly swear the testimony you shall give before this Court shall be the truth, so help you, God?**

THE WITNESS: I do.

THE CLERK: Thank you, you may be seated.

S T A C E Y V I D A

WAS THEREUPON CALLED AS A WITNESS HEREIN, AND AFTER HAVING BEEN FIRST DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. O'MERA:

Q Hi.

Good morning.

Would you please state your name for the Jury?

A Stacey Vida.

Q And, you---

THE COURT REPORTER: Spell your last name for me, please?

* * *

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[Q Mr. O'Mera; A Mr. Vida]

A Yes. Right.

Q Told you his name?

A Yes.

Q Gave you background information about himself?

A (No verbal response.)

Q In terms of his age, address, where he lives, things like that?

A Um ---I do not recall that.

Q He ---did he, at any point, indicate to you, or his demeanor indicate to you that he was either being untruthful or was not physically did not physical capacity to provide you with information?

A No.
Q Did he provide you information about the appearance of any of the people that were involved on the other side in this confrontation?
A Yes.
Q What information did he provide?
A May I refer to the police report?
Q Yes.
A A twenty-three (23) to twenty-five (25) year old short Afro, light-skinned, black male, six one wearing a black leather jacket and blue jeans.
Q Twenty-three (23) to twenty-five (25) years old, short Afro, light-skinned, black male, six one wearing a black
[Page 21]
leather jacket and blue jeans?
A Correct.
Q Was he able to provide you with any other information about other individuals?
A Just that they were black males.
Q Did you request from him other information about other individuals who were present at the scene?
A I do not recall.
Q Would you refer to page 8 of your narrative report, line 19. And tell me if that entry by you would refresh your recollection about whether or not you inquired about other suspect information?
A Yes, I did.
He indicated that he had no further information.
Q So, your recollection now, having been refreshed by your report is that you did ask, 'Do you know anything else about any other people?'
A No, I don't.
Q And, he said, --- No, you don't recall that now?
Or he answered, 'No, I don't'.
Is that what you are saying?
A Correct.

Q Because even though you have been a police officer ---

MR. BILKOVIC: (Interposing) Objection, leading.

Q (By Mr. O'Mera, continuing) Is it true that even

* * *

[Page 46]
[Q by Mr. O'Mera; A by Mr.Wing]
[Q by Mr. O'Mera continuing] this?
A That's correct, sir.
Q And, he indicated to you that he might be able to identify the shooter-passenger, correct?
A That's correct, sir.
Q And, then he gave you a physical description of the shooter, is that correct?
A Yes, sir, he did.
Q Which was that he was a black male about twenty-three (23) to twenty-five (25) years old, short Afro with medium to light skin with a black leather jacket?
A Yes, sir.
Q And, you, as a trained police officer, with sixteen (16) years experience, interviewing --- with hundreds (100s), you know, have to be hundreds (100s) or thousands (1000s) of times interviewing witnesses to crimes, is that fair to say?
A Yes, sir.
Q And, with your acknowledged believe that 'Who done it?' is a critical --- identifying descriptive information, I mean, by who done it, I mean, a name, a description, a clothing description, a clothing description, an address, something that would tell me who done it?

But that is perhaps a critical piece of information you are trying to get from a witness. You would have

* * *

[Page 60]
[Q by Mr. O'Mera; A by Mr. Wakefield]
A Not in reviewing the report.
Q Did reviewing the report prompt you to have an independent recollection of what Frederick France said?
A Yes.
Q You now remember what Frederick France said?
A Yes.
Q What did Frederick France say?
A He had described the suspect as a twenty-three (23) or twenty-five (25) year old, light-skinned black male, short Afro, black leather jacket, jeans.
Q You were present when Frederick France made that statement to Officer Vida?
A Yes.
Q Was Detective Wing present when he made that identification?
A I don't know if he was specifically standing there when he made the statement or if he stepped away. There was a lot of commotion at the time.
Q Did Officer Vida, the officer who was under your supervision and training tell Mr. France that the shooter was light-skinned?
A I don't recall that at all, no.
Q Would it be proper police procedure for a police officer to tell a witness the facts of the case?
A Would ---

* * *

[Page 87]
[Q by Mr. O'Mera; A by Ms. Stephens]
[Q by Mr. O'Mera continuing] it or grey stripe, something like that?
A Yeah.
Q With --- a some point it had those fancy tires on, people have?
A Um-hum.

Q Is that a 'yes"?
A Yes.
I'm sorry.
Q You have to answer, the Court Reporter has to write it down.
A Yes.
Q Do you know what the interior color of that van was?
A I can't recall that.
Q Do you recall if he had a television or a stereo or anything in there?
A I can't recall that. not when he first got it. I don't remember all, you know, it was just plain. It was just a plain white van.
Q How long had he had it in January?
A I'm not for sure.
Q Do you know whether he is right-handed or left-handed?
A Yes. He's left-handed?
Q How do you know that?
A I have been with him for six years.
Q Has he ever confessed to you that he committed this

* * *

[Page 107]
[Q by Mr. O'Mera; A by Ms. Mallory]
A If it would have happened, but...
Q It did not happen?
A No.
Q Do you know whether Van Thompkins is right-handed or left-handed?
A Yes, I do.
Q And, what is it?
A He's left-handed?
Q And, how do you know that?
A Because I have been around him all my life.

Q Did you ever see him fire a gun with his right hand?
A No, I never seen him with a gun.
Q Are you lying here today to save your cousin from a murder case?
A No, I am not.
Q Did you come down here because I asked you to come down here?
A No, I came down here.
Q You came down here?
A By myself.
MR. O'MERA: Thank you, your Honor.

CROSS-EXAMINATION
BY MR. BILKOVIC:
Q You mentioned something interesting, Lakeisha, failed to tell us.

* * *

[Page 110]
[Q by Mr. Bilkovic; A by Ms. Mallory]
A Well, I heard about it, I didn't see it.
Q Okay.
So, when you just testified to the Jury that you saw Omar's statement, that wasn't true was it?
A No.
Q This picture that you saw, do you remember seeing the news cast?
A Yes.
Q Do you remember seeing Van Thompkins?
A Yes.
Q Do you know the person in the middle?
A Yes.
Q Eric Purifoy?
A Yes.
Q Who is Brenda Fields?
A My cousin.

Q Your cousin.

Are you friends with Brenda Fields?

A Yes.

Q Is she in court today?

A Yes.

Q Sitting with Van Thompkins family members and friends?

A Yes.

Q Because she is a family member of Van Thompkins, right?

A Yes.

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[The Court continuing] one-thirty (1:30).

THE CLERK: Yes, Judge.

(Whereupon the Jury left the courtroom.)

* * * [in original transcript]

THE COURT: The Court will be in recess.

(Whereupon the luncheon recess was taken.)

* * * [in original transcript]

THE COURT: Are we ready to proceed?

Bring the Jury in, please.

THE CLERK; Yes, your Honor.

(Whereupon the Jury was returned to the courtroom.)

* * *[in original transcript]

THE CLERK: You may be seated.

THE COURT: At this time the Court is going to recognize Mr. Bilkovic for purposes of closing argument.

MR. BILKOVIC: Thank you, your Honor.

Ladies and Gentlemen, this is a case about the relationship between these two people.

At Eric Purifoy's trial the Jury had to find, in order to find him guilty of First Degree Murder, that he drove up to that Rite-Aid and sat there, thereby assisting Van Thompkins.

He sat there and he watched Van Thompkins and allowed Van Thompkins to shoot somewhere between

seven and ten (10) shots and then he calmly drove away. That
[Page 121]
is what they had to find to find him guilty.

So, what does he do? He twists it and indicates he hits the floor. Because, by hitting the floor he doesn't know what is going on.

Is that believable? Did Eric Purifoy's Jury make the right decision? I'm not here to judge that. You are not bound by what his Jury found. Take his testimony for what it was, twisted attempt to help not just an acquaintance but his tight buddy.

Remember one thing on the stipulation, those letters, they were in the possession of the Defendant until after the trial started. Violated an Order that they be turned over a year ago.

What do guilty people do that have the resources when they know they are being charged with a crime? They did exactly what he did, you take off. They drop their lives. And look at what he dropped?

He didn't just drop the van, he dropped Tomika and Lakeisha who love him with all of their heart. Dropped them. He dropped his mom, he dropped his grandmother, he dropped his friends, he dropped his child. Why? Because what he had done over a year. And, not just running and going into hiding, he was down in Ohio living out in the open, 'That's who I am, Isaiah Reed.' Buying cars, driving around, hanging out.

* * *

[Page 124]
[Mr. Bilkovic]
Homicide Unit.' Well, you found out, he wasn't in a Homicide Unit for a homicide, he was in a Homicide Unit because Homicide Investigators from Detroit were helping Homicide Investigators in the City of Southfield.

He is able to tell you the inside of the van, the captains chairs, the long seat in the back. He is able to talk about the kicker box that was in the back. He is able to describe the van to you. He tells you 'We were buddies. We used to smoke weed together. I talked to him, he told me I shot the Niggers up, popped them Niggers out in Southfield.'

So, what happened? They call in two witnesses that didn't have a clue. We'll try to make Omar Stephens look bad. 'We read Omar Stephens' statements six months ago.' 'I love him with all my heart.' And, yet, for the year that he is gone wasn't worried about him. 'Didn't know where he was.' 'Didn't care. I 'Wasn't my business. '

How believable was that?

'Oh, yeah, we talked. I knew he was wanted for murder, saw his picture on t.v.'

I asked them about it, 'It wasn't important.'

Look at their testimony carefully. I submit to you it was a joke. It was an absolute joke.

Finally, Detective Helgert. 'Did you pray to God [Page 125]
to forgive you for shooting that boy down?'

Not, 'I didn't do it.'

Not, 'I was there, but it was Eric Purifoy.'

'Do you pray to God to forgive you for shooting that boy down?'

'Yes'.

Did Detective Helgert take a tape recorder? No. But, what did he do? Gave Van Thompkins the opportunity to write it down in his handwriting and he refused to do it.

'Do you pray to God to forgive you for shooting that boy down?'

'Yes.'

Take all the testimony as a whole. Everybody, Eric Purifoy, Frederick France, Omar Stephens, Detective Helgert. Who was the passenger? Who was the shooter?

Van Thompkins. Eric Purifoy, Frederick France, without knowing what each one of them was going to say, and without knowing what either one of them did say, Defendant (indicating), passenger (indicating), Eric Purifoy (indicating) driver.

All of the evidence in this case points to Van Thompkins and there is good reason for it. Van Thompkins was sitting in that passenger seat. Van Thompkins had that gun. Van Thompkins fired that gun.

* * *

[Page 148]
[Mr. O'Meara continuing]
know. Was it a guy who looked younger or older? We've never going to know. All we are ever going to know is that he didn't pick Van Thompkins. And, the only explanation for why this is not a clear indication that his identification is untrustworthy is because --- well, this picture is from 1994.

Look at it. Paint a beard on it in your mind. Scruff his hair up so it is up on top of his head. If your face is emblazoned in your brain forever, aren't you going to think about this picture? I mean, the difference, the only difference is that the hair and the goatee, look at him, he's the same. This is two years later. He is the same now. He could be fifteen (15) today.

The evidence does not show that Van Thompkins is a murder. The evidence shows that Van Thompkins has made stupid, stupid, stupid decisions in his life. Who to hang out with, about whether to face justice, about what kind of friends to have. And, I submit to you, you go back there and you think about this, and you read the letters, and you think about what you actually heard and set aside your bias.

Set aside you prejudice. Set aside your gut revulsion you might have for him, for people who would have friends who would do something like this. For
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[Mr. O'Mera continuing] people who would involved in this type of ugly situation that you and I it just doesn't happen to us when we go to Rite-Aid.

And, I want you to look at the evidence, because he's either the shooter or he is not guilty. And there is no evidence whatsoever that makes him the shooter.

Thank you very much.

THE COURT: Mr. Bilkovic.

MR. BILKOVIC: If you think he looks fifteen (15) and you go back and take a look at his picture and you think that's what he looks like right now, then there nothing more that I am going to be able to say that will change your mind.

Now, we talked a little bit in Jury Selection about proving a case about a reasonable doubt and one of the Jurors that I excused talked about the element beyond all doubt. I will tell you right now, you can't do what Mr. O'Mera wants me to do. I can't prove this case to you beyond all doubt. It would be impossible. The only way I can do that is that if you were there and you saw what happened. And, if you were, you wouldn't be Jurors, you'd be witnesses. I have to prove this to you beyond a reasonable doubt.

And, when you are a Defense lawyer, and I know he likes to belittle and, I think, facetiously, Mr. O'Mera

* * *

[Page 154]

[Mr. Bilkovic continuing]

Mr. Giten, Mr. Stephens. They want to classify him as a liar because he thinks the inside of the van is blue, might be another color, he's not sure, bluishgrey. He's been there five or six times. The person that loves him with all her heart can't recall the color either. So, what does that mean? Nothing.

What he does know is there is a kicker box there, a large speaker box, this big, in the back. Same as what Detective Helgert found in that van.

Mr. O'Mera told you one other thing. He told you if he is not the shooter he is not guilty. That is not necessarily true. The evidence in this case has shown beyond a reasonable doubt that he murdered --- Van Thompkins murdered Samuel Morris.

You are going to get another term. You are going to get an Instruction that you don't have to believe everything a witness says. You don't have to believe everything. You can believe parts. If you have a feeling it was Eric Purifoy, that's probably what you are going to do. You can disregard some, you can believe some.

There's a law in Michigan called Aiding and Abetting. The Evidence has not shown us, the evidence hasn't shown that Van Thompkins is the shooter, if you go back there, and the evidence is consistent, Myzell [Page 155]

[Mr. Bilkovic continuing] Woodward was in the back. Myzell Woodward has nothing to do with this. If any of you have any beyond a reasonable doubt, and if any of you may be thinking maybe Eric Purifoy was sitting in that seat. Some of the evidence has shown that. Some of you think that, is the driver of van, is the owner of the van, if Van Thompkins pulls that gun out and doesn't run his script and doesn't hit the floor and watches that shooting go down he is just as guilty as if he pulled the trigger.

So, if any of you are thinking that, you know what? I think he knew about it. I think he was driving the car, I think that is what happened, I am fairly certain beyond a reasonable doubt that he was the driver, he is just as guilty. No matter how you slice it.

The witnesses testimony, his identification of himself by running, and the one thing Mr. O'Mera didn't have any answer for, 'Did you pray to God to forgive you for shooting that boy?' 'Yes.' He is guilty.

Find him guilty.

Thank you.

THE COURT: Ladies and Gentlemen of the Jury, this is the case of THE PEOPLE OF THE STATE OF MICHIGAN, as Plaintiff, VERSUS VAN CHESTER THOMPKINS JR., as Defendant, being case Number 2001-178216-FC.

Members of the Jury, the evidence and arguments in

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this case are finished, and I will not instruct you on the law. That is, I will explain the law that applies to this case.

Remember that you have taken an oath to return a true and just verdict, based only on the evidence and my instructions on the law. You must not let sympathy or prejudice influence your decision.

As Jurors, you must decide what the facts of this case are. This is your job and nobody elses. You must think about all of the evidence and the testimony and then decide what each piece of evidence means and how important you think it is. This includes whether you believe what each of the witnesses said. What you decide about any fact in this case is final.

It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, follow what I say.

At various times I have already given you some instructions about the law. You must take all of my instructions together as the law you are to follow. You should not pay attention to some instructions and ignore others.

To sum up, it is your job to decide what the facts of the case are. To apply the law as I give it to you, and in that way, decide the case.

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A person accused of a crime is presumed to be innocent. This mean, that you must start with the presumption that the Defendant is innocent. This presumption continues throughout the trial and entitles

the Defendant to a verdict of not guilty, unless you are satisfied beyond a reasonable doubt that the Defendant is guilty.

Every crime is made up of parts called elements. The Prosecutor must prove each element of the crime beyond a reasonable doubt. The Defendant is not required to prove the Defendant's innocence or to do anything. If you find that the Prosecutor has not proven every element beyond a reasonable doubt, then you must find the Defendant not guilty.

A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that --- a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

Every Defendant has the absolute right not to testify. When you decide the case, you must not consider the fact that the Defendant did not testify. it must not affect your verdict in any way.

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When you discuss the case and decide on your verdict. You may only consider the evidence that has been properly admitted in this case. Therefore, it is important for you to understand what is evidence and what is not evidence.

Evidence includes only the sworn testimony of witnesses, the Exhibits admitted into evidence and anything else I told you to consider as evidence.

Many things are not evidence. And you must be careful not to consider them as such. I will now describe some of the things that are not evidence.

The fact that the Defendant is charged with a crime and is on trial is not evidence.

The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories.

The lawyers' questions to witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.

My comments, rulings, questions and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law, and to tell you
[Page 159]
the law that applies to this case.

However, when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you should decide this case from the evidence.

At times during the trial I have excluded evidence that was offered, or stricken testimony that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I let in, and nothing else.

Your decisions should be based on all of the evidence regardless of which party produced it.

You should use your own common sense and every day knowledge in weighing and judging the evidence, but you should not use any personal knowledge you may have about a place, person, or event.

To repeat, once more, you must decide this case based only on the evidence admitted during this trial.

As I said before, it is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is.
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You do not have to accept or reject everything a witness said. You are free to believe all, none, or part of any person's testimony.

In deciding which testimony you believe, you should rely on your own common sense and everyday experience. However, in deciding whether you believe a witness's testimony you must set aside any bias or prejudice you have based on the race, gender, or national origin of the witness.

There is no fixed set of rules for judging whether you believe a witness. But, it may help you think about these questions;

Was the witness able to see or hear clearly?

How long was the witness watching or listening?

Was anything else going on that might have distracted the witness?

Did the witness seem to have a good memory?

How did the witness look and act while testifying.

Did the witness seem to be making an honest effort to tell the truth?

Or, did the witness seem to evade the questions or argue with the lawyers?

Does the witness's age and maturity affect how you judge his or her testimony?

Does the witness have any bias, prejudice, or

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personal reason in how this case is decided?

Have there been any promises, threats, suggestions, or other influences that affected how the witness testified in general?

Does the witness have any special reason to tell the truth, or any special reason to lie?

All in all, how reasonable does the witness's testimony seem when you think about all of the other evidence in the case.

Sometimes the testimony of different witnesses will not agree, and you must decide which testimony you accept?

You should think about whether the disagreement involves something important or not. And whether you think someone is lying or simply mistaken.

People see and hear things differently, and witnesses may testify honestly, but simply be wrong about what they thought they saw or remembered.

It is also a good idea to think about which testimony agrees best with the other evidence in the case.

However, you may conclude that a witness deliberated about something that is important to how you decide the case. If so, you may choose not to accept anything that that witness said.

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On the other hand, if you think the witness lied about some things but told the truth about others, you may simply accept the part that you think is true and ignore the rest.

The Prosecution has introduced evidence of a statement that it claims the Defendant made. You cannot consider such an out-of-court statement as evidence against the Defendant, unless you do the following:

First, you must find that the Defendant actually made the statement as it was given to you.

If you find that the Defendant did not make the statement at all, you should not consider it.

If you find the Defendant made part of the statement, you may consider that part as evidence.

Second, if you find that the Defendant did make the statement, you must decide whether the whole statement or part of it is true. When you think about whether the statement is true, you should consider when and how the statement was made as well as all of the other evidence in the case. You may give the statement whatever importance you think it deserves.

You may decide it was very important or not very important at all. In deciding this, you should once again think about how and when the statement was made
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and about all of the other evidence in the case.

The evidence in this case if of two different types. Direct and Circumstantial.

Facts can be proved by Direct Evidence from a witness or an Exhibit. Direct Evidence is evidence about what we actually see or hear.

For example, if you look outside and see rain falling, that is direct evidence it is raining.

Facts can also be proved by indirect or circumstantial evidence. Circumstantial evidence is evidence that normally or reasonably leads to other facts.

So, for example, if you see a person come in from outside wearing a raincoat covered with small drops of water, that would be circumstantial evidence that it is raining.

You may consider circumstantial evidence. Circumstantial evidence, by itself, or a combination of circumstantial evidence and direct evidence can be used to prove the elements of a crime. In other words, you should consider all of the evidence that you believe.

There has been some evidence that the Defendant tried to run away after the alleged crime.

This evidence does not prove guilt. A person may run for innocent reasons, such as panic, mistake, or
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fear. However, a person may run because of a conscientiousness of guilt.

You must decide whether the evidence is true, and if true, whether it shows that the Defendant had a guilty state of mind.

There has been some evidence that a witness made an earlier statement that did not agree with his testimony during trial. You must be very careful about

how you consider this evidence. The statement was not made during the trial, so you must not consider it when you decide whether the elements of the crime have been proven.

On the other hand, you may use it to decide whether the witness is truthful. Consider the statement carefully. Ask yourself if the witness made the statement, whether it was true and, whether it differs from the witness's testimony here in court. Then remember that you may only use it to help you decide whether you believe the witness's testimony here in court.

However, if the witness testified that the earlier statement was true, or the earlier inconsistent statement was given under oath, subject to the penalty of perjury at a hearing, it may be considered at proof of the facts in the statement.

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When the lawyers agree on a statement of facts, these are called stipulated fact. You may regard such stipulated facts as true, but you are not required to do so.

You should not decide this case on which side presented more witnesses. Instead, you should think about each witness and each piece of evidence and whether you believe them. Then you must decide whether the testimony and evidence you believe proves beyond a reasonable doubt that the Defendant is guilty.

You have heard that a lawyer talked to one of the witness. There is nothing wrong with this. A lawyer may talk to a witness to find out what a witness knows about the case and what the witness's testimony will be.

A witness says that he took part in a crime that the Defendant is charged with committing.

The witness has already been convicted out of the charges arising out of the commission of that crime. Such a witness is called an accomplice. You should exam an

accomplices testimony closely and be very careful in accepting it.

You may think about whether an accomplices testimony is supported by other evidence, because then it may be more reliable. However, there is nothing wrong with the Prosecutor using an accomplice as a [Page 166] witness.

You may convict the Defendant based only on the accomplice's testimony, if you believe the testimony and it proves the Defendant's guilt beyond a reasonable doubt. When you decide whether you believe an accomplice, consider the following:

Was the accomplice's testimony falsely slanted to make the Defendant seem guilty because of the accomplice's own interest, bias, or for some other reason?

Has the accomplice been offered an award, or promised anything that might lead him to give false testimony?

Does the accomplice have a criminal record?

In general you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness.

You should be sure you have examined it closely before you base a conviction on it.

You have heard testimony from a witness who has given you an opinion as an expert. Experts are allowed to give opinions in court about matters they are experts on.

However, you do not have to believe an expert's opinion. Instead, you should decide whether you believe [Page 167]
it and how important you think it is.

When you decide whether you believe an expert's opinion, think carefully about the reasons and facts that were given for the opinion, and whether those facts are true.

You should also think about whether the expert's qualifications, and whether the opinion makes sense when you think about all the other evidence in the case.

You have heard testimony from a witness who is a police officer. That testimony is to be judged by the same standards you use to evaluate the testimony of any other witness.

One of the issues in this case the identification of the Defendant as the person who committed the crime. The Prosecutor must prove beyond a reasonable doubt that the crime was committed and that the Defendant was the person who committed it.

In deciding how dependable an identification is, think about such things as,

How good a chance the witness had to see the offender at the time;

How long the witness was watching;

Whether the witness had seen or known the offender before;

How far away the witness was;

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Whether the area was well-lighted;

And, the witness's state of mind at that time.

Also, think about the circumstances at the time of the identification, such as;

How much time had passed since the crime,

How sure the witness was about the identification;

And the witness's state of mind during the identification.

You may also consider any times that the witness failed to identify the Defendant, or made an identification that did not agree with his identification of the Defendant during trial.

You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification, because then it may be more reliable.

However, you may use the identification testimony alone to convict the Defendant, as long as you believe the testimony and you find that it proves beyond

a reasonable doubt that the Defendant was the person who committed the crime.

You may also consider whether the Defendant had a reason to commit the alleged crimes, but a reason, by itself, is not enough to find a person guilty of a crime.
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The prosecutor does not have to prove that the Defendant had a reason to commit the alleged crime. He only has to show that the Defendant actually committed the crime or he aided and abetted, and that he meant to do so.

In this case, the Defendant is charged with committing First-Degree Premeditated Murder, or intentionally assisting someone else in committing it.

Anyone who intentionally assists someone else in committing a crime or crimes, is as guilty as the person who directly commits them and can be convicted of those crimes as an aider and abettor.

To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt.

First, that the alleged crime was actually committed, either by the Defendant or someone else. It does not matter whether anyone else has been convicted of the crime.

Second, that before or during the crime the Defendant did something to assist in the commission of the crime.

Third, that the Defendant must have intended the commission of the crime alleged, or must have known that the other person intended its commission at the time of giving the assistance.
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It does not matter how much help, advice, or encouragement the Defendant gave. However, you must decide whether he intended to help another commit the crime, and whether his help, advice, or encouragement actually did help, advise, or encourage the crime.

Even if the Defendant knew that the alleged crime was planned or was being committed, the mere fact that he was present when it was committed is not enough to prove that he assisted in committing it.

The Defendant is charged with the crime of First-Degree Premeditate Murder.

To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant caused the death of Samuel Morris, that is, that Samuel Morris died as a result of multiple gunshot wounds.

Second, that the Defendant intended to kill Samuel Morris.

Third, that this intent to kill was premeditated, that is, thought out beforehand.

Fourth, that the killing was deliberate, which means that the Defendant considered the pros and cons of the killing and thought about and chose his actions before he did it. There must have been real and

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substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill.

The law does not say how much time is needed. It is for you to decide if enough time passed under the circumstances of this case. The killing cannot be the result of a sudden impulse without thought or reflection.

Fifth, that the killing was not justified, excused, or done under circumstances that reduce it to a less crime.

The crime of First Degree Premeditated Murder requires proof of a specific intent. This means that the Prosecution must prove not only that the Defendant did certain acts, but he did the acts with the intent to cause a particular result.

For the crime of First Degree Premeditated Murder, this means that the Prosecution must prove that the Defendant intended to kill another person, or he

aided and abetted another knowing that person intended to kill, and that the intent to kill was premeditated; That is, thought out beforehand, and that the killing was deliberate.

The Defendant's intent may be proved by;

What he said.

[Page 172]

What he did.

How he did it.

Or by any other facts and circumstances in evidence.

You may also consider the lesser charge of Second Degree Murder.

To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant caused the death of Samuel Morris, or aided and abetted in causing the death of Samuel Morris. That is, that Samuel Morris died as a result of multiple gunshot wounds.

Second, that the Defendant had one of these three states of mind:

He intended to kill, or he intended to do great bodily harm to Samuel Morris, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions.

You must think about all of the evidence in deciding what the Defendant's state of mind was at the time of the alleged killing.

The Defendant's state of mind may be inferred from the kind of weapons used,

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The type of wounds inflicted,

The acts and words of the Defendant,

And any other circumstances surrounding the alleged killing.

You may infer that the Defendant intended to kill or aided and abetted, if a dangerous weapon was used in a way that was likely to cause death.

Likewise, you may infer that the Defendant intended the usual results that follow from the use of a dangerous weapon.

A gun is a dangerous weapon.

A dangerous weapon is any instrument that is used in a way that is likely to cause serious physical injury or death.

Premeditation and deliberation may be inferred from any actions of the Defendant which show planning or from any other circumstances surrounding the killing. The Prosecutor need not prove a motive for the killing, but you may consider evidence of motive in deciding if there was premeditation and deliberation. Motive, by itself, does not prove premeditation and deliberation.

If you find the Defendant guilty of Murder, you must state in your verdict whether it is Murder in the First Degree or Murder in the Second Degree.

Under Counts 2, 4, 6, it is charged in this case

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that the Defendant either directly possessed a firearm or intentionally assisted someone else to possess a firearm during the commission of the crimes of First Degree Premeditated Murder, Second Degree Murder, Assault with Intent to Murder, Assault with Intent to do Great Bodily Harm Less than Murder, or Possession of a Firearm by a Felon.

Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an Aider and Abettor.

Before you may convict the Defendant you must be convinced of the following beyond a reasonable doubt:

First, that either the Defendant or someone else carried or possessed a firearm during the commission of the crimes of First Degree Premeditated Murder, Second

Degree Murder, Assault with Intent to Murder, Assault with Intent to do Great Bodily Harm Less than Murder, or Possession of a Firearm by a Felon.

It is not necessary, however, that anyone be convicted of those crimes.

Second, that the Defendant did something to assist or encourage the possession of the firearm knowing that the possessor intended to possess the firearm during the commission of the crimes which have been describe for

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you.

In this case, the Defendant is charged with committing Assault with intent to Murder, or intentionally assisting someone else in committing it.

Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an Aider and Abettor.

To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the alleged crime was actually committed, either by the Defendant or someone else. It does not matter whether anyone else has been convicted of the crime.

Second, that before or during the crime, the Defendant did something to assist in the commission of the crime.

Third, that the Defendant must have intended the commission of the crime alleged, or must have known that the other person intended its commission at the time of giving the assistance.

It does not matter how much help, advice, or encouragement the Defendant gave. However, you must decide whether he intended to help another commit the

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crime, and whether his help, advice, or encouragement actually did help, advise, or encourage the crime.

Even if the Defendant knew that the alleged crime was planned, or was being committed, the mere fact that the Defendant was present when it was committed is not enough to prove that the Defendant assisted in committing it.

Under Count 3, the Defendant is charged with the crime of Assault with Intent to Murder.

To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant tried to physically injure another person, or aided and abetted another who tried to physically injure another person.

Second, that when the Defendant committed the assault, or aided and abetted in the commission of the assault, he or the other person had the ability to cause an injury, or at least believed that he or the other person had the ability.

Third, that the Defendant intended to kill the person he assaulted, or he knowingly aided and abetted another who intended to kill and the circumstances did not legally excuse or reduce the crime.

The crime of Assault with Intent to Commit Murder

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requires proof of a specific intent.

This means that the Prosecution must prove not only that the Defendant did certain acts, but that he did the acts with the intent to cause a particular result.

For the crime of Assault with Intent to Commit Murder, this means that the Prosecution must prove that the Defendant intended to cause great bodily harm to the person or he aided and abetted another knowing that person intended to kill.

The Defendant's intent may be proved by:

What he said,

What he did,

How he did it,

Or, by any other facts and circumstances in evidence.

You may also consider the lesser charge of Assault with Intent to do Great Bodily Harm less than Murder.

To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant tried to physically injure another person, or aided and abetted another, who tried to physically injure another person.

Second, that when the Defendant committed the assault or aided and abetted in the commission of the [Page 178]
assault, he or the other person had the ability to cause an injury, or at least believed that he or the other person had the ability.

Third, that the Defendant intended to cause Great Bodily Harm to the person he assaulted, or he knowingly aided and abetted another, who intended to cause Great Bodily Harm to the person assaulted.

Actual injury is not necessary, but if there was an injury, you may consider it as evidence in deciding whether the Defendant intended to cause Great Bodily Harm.

Great Bodily Harm means a physical injury that could seriously and permanently harm the health or function of the body.

The Crime of Assault with Intent to Do Great Bodily Harm, Less than Murder requires proof of a specific intent.

This means, that the Prosecution must prove not only that the Defendant did certain acts, but he did the acts with the intent to cause a particular result.

For the crime of Assault with Intent to Commit Great Bodily Harm Less than Murder, this means that the Prosecution must prove that the Defendant intended

to cause Great Bodily Harm to the person, or he aided and abetted another knowing that the person intended to
[Page 179]
cause Great Bodily Harm.

The Defendant's intent may be proved by;

What he said,

What he did,

How he did it,

Or, by any other facts and circumstances in evidence.

The intent with which an assault is made can sometimes be determined by whether a dangerous weapon was used.

A dangerous weapon is any instrument that is used in a way that is likely to cause serious physical injury or death.

A dangerous weapon is any object that is used in a way that is likely to cause serious physical injury or death.

A gun is a firearm. A firearm includes any weapon from which a dangerous object can be shot or propelled by the use of explosives, gas, or air.

It does not matter whether or not the gun was loaded.

Under Count 5, the Defendant is charged with having possessed or used a firearm in this State after having been convicted of a felony.

To prove this charge, the Prosecutor must prove
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each of the following elements beyond a reasonable doubt:

First, the Defendant possessed or used a firearm in this state.

Second, that the Defendant was convicted of a felony.

And, third, that less than five years had passed since any term of probation has been completed.

This is a crime --- strike that.

In this case the Defendant is charged with committing, Carrying a Concealed Weapon, or Intentionally Assisting Someone Else in Committing it.

Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted by --- of that crime as an Aider and Abettor.

To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt.

First, that the alleged crime was actually committed, either by the Defendant or someone else. It does not matter whether anyone else has been convicted of the crime.

Second, that before or during the crime, the Defendant did something to assist in the commission of
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the crime.

Third, that the Defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance.

It does not matter how much help, advice, or encouragement the Defendant gave. However, you must decide whether he intended to help another commit the crime, and whether his help, advice, or encouragement actually did help, advise, or encourage the crime.

Even if the Defendant knew that the alleged crime was planned or was being committed, the mere fact that he was present when it was committed is not enough to prove that he assisted in committing it.

The Defendant is charged, in Count 7, with the crime of Carrying a Concealed Weapon.

To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that a gun was in the vehicle that the Defendant was in.

Second, that the Defendant knew the gun was there.

Third, that the Defendant took part in carrying or keeping the gun in the vehicle.

A gun is a firearm. A firearm includes any weapon
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from which a dangerous object can be shot or propelled by the use of explosives, gas, or air.

It does not matter whether or not the gun was loaded or not.

When you go to the Jury room, you should first choose a Foreperson. The Foreperson should see to it that your discussions are carried on in a businesslike way and that everyone has a fair chance to be heard.

A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on that verdict.

In the Jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgment of each Juror.

It is your duty as Jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them, but keep an open mind as you listen to your fellow Jurors. Rethink your opinions and do not hesitate to change your mind, if you decide you were wrong. Try your best to work out your differences.

However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other Jurors
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disagree with you, or just for the sake of reaching a verdict. In the end, your vote must be your own, and you must vote honestly and in good conscience.

Possible penalty should not influence your decision. It is the duty of the Judge to fix the penalty within the limits provided by law.

If you want to communicate with me while you are in the Jury room, please have your Foreperson write a note and give it to the bailiff. It is not proper for you to talk directly with the judge, lawyers, Court Officers, or other People involved in the case.

As you discuss the case, you must not let anyone, even me, know how your voting stands. Therefore, until you return with a unanimous verdict, do not reveal this to anyone outside the Jury room.

If you want to look at any or all of the Exhibits that have been admitted, just ask for them by writing a note.

This is the case between THE PEOPLE OF THE STATE OF MICHIGAN and the DEFENDANT, VAN CHESTER THOMPKINS.

You should give it your most careful consideration. You must not decide this case by reason of sympathy, fear, or prejudice. You must not be influenced by any of those emotions, but solely by a sense of justice and your obligations under your oaths.

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Take the evidence, and weigh it conscientiously, carefully and thoroughly.

You are to weigh the evidence as to each separate count charged in the Information, and to agree upon a unanimous verdict as to each count.

Now, as to Count 1, if you are satisfied beyond a reasonable doubt that the people have proven their case as the Court has defined it for you, you may find the Defendant:

Guilty of First Degree Premeditated Murder, or Guilty of the less serious offense of Second Degree Murder.

If not, if the elements constituting either of these offense have not been proven beyond a reasonable doubt, your verdict should be;

Not guilty as to Count 1.

As to Counts 2, 4 and 6:

If you are satisfied beyond a reasonable doubt that the People have proven their case as the Court has defined it for you, you may find the Defendant; Guilty of Possession of a Firearm in the Commission of a Felony.

If not, if the elements constituting these offenses have not been proven beyond a reasonable doubt, your verdict should be;

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Not Guilty as to Counts 2, 4 and 6.

As to Count 3, if you are satisfied beyond a reasonable doubt that the People have proven their case, as the Court has defined it for you, you may find the Defendant;

Guilty of Assault with Intent to do Murder, or,

Guilty of Assault with Intent to do Great Bodily Harm Less than Murder.

If not, if the elements constituting either of these offense have not been proven beyond a reasonable doubt, you verdict should be:

Not Guilty as to Count 3.

As to Count 5, if you are satisfied beyond a reasonable doubt that the People have proven their case as the Court has defined it for you, you may find the Defendant:

Guilty of Possession of a Firearm by a Felon.

If not, if the elements constituting this offense has not been proven beyond a reasonable doubt, your verdict should be:

Not Guilty as to Count 5.

As to count 7, if you are satisfied beyond a reasonable doubt that the People have proven their case as the Court has defined it for you, you may find the Defendant:

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Guilty of Carrying a Concealed Weapon, to-wit: A gun in a motor vehicle.

If not, if the elements constituting this offense has not been proven beyond a reasonable doubt, your verdict should be:

Not Guilty as to Count 7.

Take this case under advisement, Members of the Jury, and do your duty under your oaths.

You have nothing to do in this case but determine the guilt or innocence of the Defendant. You are the sole Judges of the facts. The Court has given you the law, but you are absolute in the realm of fact.

You must, as I said, consider all of the evidence, do not go outside the evidence, but take what has been offered, the competent evidence in this case.

Now, as to Count 1, there are three possible verdicts;

Guilty as charged of First degree Premeditated Murder, or

Guilty of the Less serious offense of Second Degree Murder, or

Not guilty.

As to Count 2, 4 and 6, there are two possible verdicts, guilty of Possession of a Firearm in the Commission of a Felony; or,

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Not guilty.

As to Count 3, there are three possible verdicts;

Guilty of Assault with Intent to Murder; or

Guilty of Assault with Intent to do Great Bodily Harm less than Murder; or

Not guilty.

As to Count 5, there are two possible verdicts;

Guilty of Possession of a Firearm by a Felon, or

Not Guilty.

As to Count 7, there are two possible verdicts;

Guilty of Carrying a Concealed Weapon, to-wit: a gun in a motor vehicle; or,

Not guilty.

Your first duty upon retiring is to select a Foreperson.

Your second duty is to agree upon a unanimous verdict as to each count.

You are not to begin your deliberations until instructed by the Court officer to deliberate.

Since there are thirteen (13) of you, and only twelve (12) decide criminal cases, I am going to ask the Clerk to put all your numbers and names in the box and shake it up and pick out one person who will be excused from further Jury service.

THE CLERK: Juror Number 184, in Seat Number 4.

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THE COURT: Sir, thank you very much for being a Juror and serving as a Juror.

When you get your things from the Jury room, if you would come down two doors is my office. My secretary will take your badge and she has a certificate of appreciation for serving as a Juror.

Thank you very much for doing your civic duty.

You may leave.

(Whereupon the excused Juror left the courtroom.)

* * *[in original transcript]

THE COURT: Would you leave the Jury out, please.

(Whereupon the Jury left the courtroom.)

* * *[in original transcript]

MR. O'MERA: Your Honor---

THE COURT: (Interposing) Just a moment.

(Whereupon a pause was had while the Jury left the courtroom.)

* * *[in original transcript]

THE COURT: Mr. Bilkovic, did you have any objections to the Instructions the Court read to the Jury?

MR. BILKOVIC: No, your Honor.

THE COURT: Mr. O'Mera, any objections to the Instructions the Court read to the Jury?

MR. O'MERA: Yes, your Honor.

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In light of the --- just to place on the record, the previous discussion we had in chambers in light of my previous motion for Directed Verdict, on the grounds that there was no evidence whatsoever produced at trial which a reasonable fact finder could rely on in support of a conviction on the Aiding and Abetting Theory.

I just place on the record that I do object to the Court having Instructed on the Aiding and Abetting Theory.

Thank you.

THE COURT: Your objection is noted.

MR. O'MERA: Other than that, your Honor, I have no objection.

THE COURT: All right.

Now, Counsel, I would like you to step forward and take a look at the possible verdict's form one last time to be sure that is what we agreed upon.

Any objections?

MR. BILKOVIC: No, your Honor.

MR. O'MERA: No, sir.

THE COURT: All right.

I will give this to the Clerk to give to the Jury after they have selected the Foreperson.

Now, for the record, People's Exhibits are 1 though 30.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v- No. 01 178216 FC

CHESTER VAN THOMPKINS, JR.,

Defendant.
_____/

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_____/

OPINION - ORDER DENYING MOTION FOR NEW TRIAL AND/OR GINTHER HEARING

At a session of said Court held in the Courthouse in the City of Pontiac, County of Oakland and State of Michigan on July 31, 2003.

PRESENT: HONORABLE RICHARD D. KUHN, CIRCUIT JUDGE

This matter is before the Court on Defendant's Motion for New Trial and/or Ginther Hearing. The Court heard oral argument and took the motion under advisement.

Defendant was convicted by a jury of first degree murder, three counts of felony firearm, assault with intent to commit murder, felon in possession of a firearm, and carrying a concealed weapon. He now moves this Court to grant a new trial and/or order a Ginther Hearing due to alleged prosecutorial misconduct and alleged ineffective assistance of counsel.

Defendant allegedly shot and killed one man, and wounded another, while in a van in the parking lot of Lou's Deli in Southfield, Michigan. His co-defendant, Eric Purifoy, was allegedly the driver of the van. Purifoy was tried separately, and found not guilty of murder, but guilty of carrying a concealed weapon. He pled guilty to felon in possession of a firearm, and felony firearm.

At trial, the prosecutor introduced the following evidence: the videotape taken at Lou's Deli, showing defendant and co-defendant Purifoy in the deli and walking out of the deli; the testimony of Frederick France, the survivor of the shooting, who identified the defendant as the ,shooter and co-defendant Eric Purifoy as the driver, both at trial and from a still photo taken from the Deli videotape; the testimony of Omar Stephens, an acquaintance of the defendant, who testified that the defendant confessed to the shooting to him over the telephone, and further, described defendant's van and .45 ,caliber gun, both of which were used in the murder; evidence of the defendant's flight from prosecution' to other jurisdictions until ultimately being apprehended in Ohio; the testimony of Eric Purifoy, the co-defendant, regarding the events in question and specifically that he saw the gun in

Defendant's hand, although he testified that he did not see him shoot the gun; and finally, Southfield Detective Chris Helgert who interrogated defendant in Ohio and testified that after Defendant had waived his right to remain silent, Defendant answered "yes" in response to his question, "Have you prayed to God to forgive you for shooting that boy down?".

Defendant alleges he was denied a fair trial due to the following instances of alleged prosecutorial misconduct and alleged ineffective -assistance of counsel:

1. The prosecutor offered evidence of the co-defendant's jury verdict and guilty plea conviction.

2. The prosecutor offered evidence of the uncharged acquaintance's unrelated bad acts.

3. The prosecutor offered opinion evidence when Det. Helgert testified, "I am absolutely convinced and am now that your client was there", and when he testified that Purifoy was charged under an aider and abettor theory.

4. The prosecutor shifted the burden of proof in his rebuttal argument.

5 The prosecutor elicited evidence of Defendant's exercise of his right to remain silent and of his right to counsel.

6. The prosecutor denigrated counsel by implying he was a liar.

7 . The prosecutor circumvented the hearsay rule by pretending to use the Purifoy letters for impeachment.

8. The prosecutor's questioning of Tomika Stephens and Det. Helgert regarding the Defendant's one-year absence from the jurisdiction was improper as it was used to offer evidence that Defendant had committed crimes other than the ones for which he was on trial.

9. Defense counsel failed to object to prosecutorial misconduct.

10. Defense counsel stipulated to two matters that unfairly prejudiced the defendant.

11. Defense counsel failed to request certain jury instructions.

12. Defense counsel admitted his client's guilt of obstruction of an officer.

13. Defense counsel failed to move to excise prejudicial information from the Purifoy letters.

14. Defense counsel failed to investigate Omar Stephens' motive for testifying.

15. Defense counsel failed to investigate Purifoy's impression that if he testified he would get immunity.

Defense counsel did not object to any instances of the prosecutor's alleged misconduct. Therefore, in reviewing the allegations of prosecutorial misconduct, this Court must use a plain error standard. *People v Schutte*, 240 Mich App 713, 720 (2000), citing *People v Carines*, 460 Mich 750, 761-762 (1999). There must be a finding that error occurred, it was plain, and it affected substantial rights. *Carines, supra* at 763. In order to make a finding that the misconduct "affected substantial

rights, the error must have been so prejudicial so as to affect the outcome of the proceedings. *People v Grant*, 445 Mich 535, 552 (1994).

As to Defendant's claims that ineffective assistance of counsel deprived him or- a fair trial, this Court must determine whether his counsel's performance fell below an objective standard or- reasonableness, and if so, whether the errors were prejudicial. *People v Pickens*, 446 Mich 298, 309 (1994). In order to find prejudice, the defendant must show a reasonable probability that, but for the errors, the result of the proceeding would have been different. *Id* at 314. A defendant must overcome the presumption that counsel's actions constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687 (1994)

This Court finds that as to Defendant's prosecutorial misconduct arguments numbered 2, 4, 5 and 7, Defendant's motion is denied for the reasons stated in the prosecutor's brief.

As to Defendant's first argument, defendant cites People v Lytal, 415 Mich 603 (1982), for the proposition that the conviction of another person involved in the same incident is not admissible at a defendant's separate trial. However, in the case at bar, Purifoy was acquitted of the murder charge. Therefore there was no conviction. Further (Defendant's theory was that Purifoy was the shooter, so admission · of Purifoy's weapons convictions and guilty pleas was not prejudicial to Defendant.

As to Defendant's third, argument regarding Det. Helgert's opinion testimony, this Court does find plain error. However, after reviewing the overwhelming evidence of Defendant's guilt, including the fact that Defendant was identified at the scene on videotape, the

Court does not find that its admission affected the outcome of the proceedings.

As to Defendant's sixth argument regarding denigration of counsel, this Court again finds plain error. Again, however, in light of the evidence, the Court does not find that its admission affected the outcome of the proceedings.

As to Defendant's eighth argument regarding the implication of crimes being committed in other jurisdictions, this Court again finds plain error. However, in light of the evidence of Defendant's guilt, the Court does not find that its admission affected the outcome of the proceedings.

As to Defendant's claims of ineffective assistance of counsel, arguments numbered 12 and 13 are denied for the reasons stated in the prosecutor's brief.

As to Defendant's ninth argument regarding defense counsel's failure to object to prosecutorial misconduct, this Court does find error. However, the Court does not find that, but for the errors, the results or- the proceeding would have been different.

As to Defendant's tenth argument regarding the stipulations, this Court finds error. However, the Court does not find that, but for the error, the results of the proceeding would have been different.

As to Defendant's eleventh argument regarding failure to request certain jury instructions, this Court finds error. However, the Court does not find that, but for the error, the results of the proceeding would have been different.

As to Defendant's fourteenth argument regarding defense counsel's failure to investigate Omar Stephens' motive for testifying, this Court finds that defense counsel sufficiently attacked Mr. Stephens' credibility and motive for testifying during cross examination and re-cross examination. See Transcript III, pp 17-25.

As to Defendant's fifteenth argument regarding defense counsel's failure to investigate Eric Purifoy's impression that if he testified, he would be granted immunity, Defendant did not cite this Court to the record, and there does not appear to be anything in the record to support this argument. Even if defendant could support this argument, the Court does not find that, but for the error, the results of the proceeding would have been different.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion for New Trial and/or Ginther Hearing is denied.

RICHARD D. KUHN
RICHARD D. KUHN, CIRCUIT JUDGE

PETITIONER'S BRIEF

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(7)

No. 08-1470

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In The

Supreme Court of the United States

MARY BERGHUIS

Petitioner,

v.

VAN CHESTER THOMPKINS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Whether the U.S. Court of Appeals for the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them.

II. Whether the Sixth Circuit failed to afford the State court the deference it was entitled to under 28 U.S.C. § 2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkins's guilt allowed the State court to reasonably reject the claim.

PARTIES TO THE PROCEEDING

Petitioner is Mary Berghuis, Warden of the West Shoreline Correctional Facility in Michigan. Petitioner was respondent-appellee in the U.S. Court of Appeals for the Sixth Circuit. This brief refers to Petitioner as the State of Michigan, because the State represents the interests of the warden here.

Respondent is Van Chester Thompkins, a prisoner in a State correctional facility in Michigan. Respondent was the petitioner-appellant in the Sixth Circuit.

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The decision of the Sixth Circuit, *Thompkins v. Berghuis*, reversing the district court's denial of habeas corpus relief is reported at 547 F.3d 572 (6th Cir. 2008). Pet. App. 1a-37a. The decision of the Michigan Court of Appeals affirming Thompkins's conviction is unpublished. Pet. App. 74a-82a.

JURISDICTION

On February 24, 2009, the Sixth Circuit entered an order denying the State of Michigan's motion for rehearing with a suggestion for rehearing en banc. The decision that Michigan asked the Sixth Circuit to rehear was entered on November 19, 2008. This Court has jurisdiction to review this writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions, including the relevant provisions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), are reproduced in the Joint Appendix. J.A. 1a-2a.

STATEMENT OF THE CASE

Van Chester Thompkins was convicted of first-degree murder, assault with intent to commit murder, and related firearms offenses after a jury trial that occurred in Oakland County, Michigan. Thompkins was sentenced to mandatory life imprisonment without the possibility of parole. His State court appeal asserted, among other claims, that his statement to police was admitted at trial in violation of *Miranda*, and that his trial counsel was ineffective for failing to request a jury instruction that limited the jury's consideration of evidence that his co-defendant, Eric Purifoy, had been previously acquitted of the murder. The Michigan Court of Appeals rejected both claims on the merits. It found that Thompkins's statement to police was properly admitted at trial because Thompkins had waived his *Miranda* rights and had never invoked them. The State court also found that Thompkins was not prejudiced by his counsel's failure to request the jury instruction because the evidence of his co-defendant's acquittal was not used improperly.

In the subsequent federal habeas corpus action, the district court similarly rejected both claims. The Sixth Circuit reversed. It found that the State court unreasonably determined the facts and unreasonably applied Supreme Court precedent. Specifically, it found that Thompkins never waived his *Miranda* rights because his "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights." Pet. App. 29a. With respect to the ineffective assistance of counsel claim, the Sixth Circuit found "given that Thompkins's central strategy at trial involved pinning the blame on Purifoy, that his jury

heard evidence . . . that Purifoy had been acquitted of murder likely exerted a powerful influence on the jury to convict Thompkins of murder. If the jury did not convict Thompkins, the jury knew that no one would be convicted for killing Morris and shooting France." Pet. App. 35a.

1. The State court challenge to the admissibility of Thompkins's statement to police.

Prior to his trial, Thompkins filed a motion to suppress "all oral and written statements by the defendant at the time of and subsequent to his arrest." The motion alleged, among other things, that the police continued to question Thompkins after he exercised his right to silence. The prosecutor denied the allegation, and the trial court set the matter for an evidentiary hearing.

Southfield Police Department Detective Christopher Helgert was the only person to testify at the hearing. J.A. 4a. He explained that Thompkins was taken into custody in Ohio a little over a year after the crime. J.A. 7a. Helgert drove down to Ohio with his partner to interview Thompkins. J.A. 7a-8a, 15a.

The interview started at 1:30 p.m. and the officers departed from the jail at 4:15 p.m. J.A. 8a, 9a-10a, 11a-12a, 15a-16a. Helgert introduced himself to Thompkins and told him that they were required to advise him of his rights before they talked to him. J.A. 8a-9a, 11a-12a, 13a-14a. Helgert then read a "Notification of Constitutional Rights" form to Thompkins. J.A. 8a. Helgert had Thompkins read right No. 5 on the form to establish that he could read, and then Helgert read out loud the first four rights. J.A. 8a, 9a-10a, 12a-13a. A

photocopy of the rights form was admitted as an exhibit. J.A. 8a-9a.[1]

Thompkins verbally indicated that he understood his rights by saying "yes," but he refused to sign or initial the form. Later during the interview he refused to touch the pen and pad of paper placed in front of him. J.A. 9a-10a, 11a.[2] Thompkins never indicated to Helgert that he wanted counsel, that he was unwilling to talk to Helgert, or that he was invoking any of his rights. J.A. 9a-10a. Helgert perceived that Thompkins's only unwillingness was "to sign anything." J.A. 13a-14a, 15a.

Helgert and his partner then attempted to persuade Thompkins to waive his rights and make a statement:

> We approached it more on the basis that he was involved and that we were there, you know, this was his opportunity to explain his side. Everybody else, including co-defendants, had given their version and this was his chance to explain his version of events. [J.A. 10a.]

This approach lasted for about two-hours and fifteen minutes. J.A. 9a-10a, 15a-17a. The repeating theme was: "This is your chance to provide your version. Eric Purifoy's provided a version, witnesses have

---

[1] The notification of rights form, which was introduced at the evidentiary hearing and at trial in State court, was not made part of the record in the federal habeas corpus proceedings in federal court. With the agreement of counsel for Thompkins, this form is attached to this brief for the convenience of this Court. *See* Attachment to Merits Brief, p. 60.

[2] At trial, Helgert testified that he no longer recalled Thompkins explicitly indicating that he understood the warnings. J.A. 148a.

provided versions, you know, what happened out there. Maybe those boys drew down on you." J.A. 16a-17a.

The detectives were not asking questions but were making statements and waiting for a response. Thompkins shared limited verbal responses. J.A. 10a, 17a-18a. He was not verbally communicative or cooperative, and "much of the time" he remained silent. J.A. 17a-20a. There were times, however, that Thompkins did respond. J.A. 21a. "Sometimes it would be eye-contact, sometimes it would be a nod of the head, sometimes, I know the words, 'I don't know' was quite prevalent." J.A. 21a. "He sat there and listened to our speech, if you will, most of the time." J.A. 22a. "Sometimes it would be a word or two. A 'yeah' or a 'no' or 'I don't know.'" J.A. 23a. And sometimes "he would look up and make eye-contact." J.A. 24a. Helgert understood these non-verbal responses to be a limited form of engagement in the conversation. J.A. 24a.

Thompkins "never indicated to [Helgert] that he was going to exercise his right to remain silent." J.A. 19a, 20a-21a. He never said "I am not saying anything" or "I'm not talking to you." J.A. 21a, 22a. And Thompkins never indicated that he wanted the questioning to end. J.A. 22a. Helgert then tried another strategy:

> I finally looked at him, and I asked him, tried to take a different tact, I guess what I call a spiritual tact, whether or not he believed in God. He made eye-contact with me for one of the few times that he did for the interview. I saw his eyes well up with tears. He answered me orally and said, 'Yes.'

> I asked if he had prayed to God? And he said 'Yes.'
>
> And I asked him if he had asked God to forgive him for—I believe the words were, and I quoted them in my report verbatim "shooting that boy down." And he answered, 'Yes.' [J.A. 10a-11a.]

This statement was put into evidence at trial. J.A. 153a (Helgert). The only other statement Thompkins made after this exchange was "I ain't writing nothing down." J.A. 11a-12a.

In its written opinion denying the motion to suppress, the trial court found that Thompkins "never invoked his right to remain silent, and participated in the interview by making eye contact, nodding, and answering questions with, 'I don't know.' Defendant then answered the two questions at issue. Defendant knowingly and intelligently waived his rights." J.A. 28a (Trial Court Opinion, May 10, 2002).

On direct appeal in the Michigan Court of Appeals, Thompkins continued to argue that his statement was inadmissible because he had implicitly invoked his right to remain silent by failing to answer the officers' questions. The Michigan Court of Appeals – which rendered the last reasoned State court opinion on the issue – found the record demonstrated that Thompkins "continued to talk with the officer, albeit sporadically. He answered questions with brief responses, or by nodding his head, but never said he did not want to talk or that he was not going to say anything." The Michigan Court of Appeals concluded that Thompkins voluntarily waived his *Miranda* rights

and never invoked them. Pet. App. 75a. The Michigan Supreme Court denied leave to appeal. Pet. App. 73a.

2. The trial and State court appeal.

On January 10, 2000, at around 9:00 p.m., Samuel Morris and Frederick France were driving through the parking lot of a strip mall located in suburban Southfield, Michigan. A group of men exited from a delicatessen and began to cross in front of them. J.A. 62a (France). Morris, the driver, slowed his car to allow the group to walk past. J.A. 62a (France). One of the men, later identified by France as Thompkins, stared the pair down as he crossed in front of the car. He continued to stare at them as he walked backwards to his own parked van. J.A. 63a-65a (France). The two groups yelled challenges at each other, and then Morris began to drive away. J.A. 67a-69a (France); J.A. 33a-34a (Biesley). The weather was clear and the strip mall lot was well lit, J.A. 34a-35a (Szabo); J.A. 38a-39a (Graves), so France got a good look at the face of the man who stared at him. J.A. 61a-62a, 63a-66a, 86a-88a, 99a-101a (France):

> I had seen them, [Thompkins] was staring at me when he first walked out of the building. When he walked out and walked in front of the car, around the car and to the back I was still staring at him, directly in this face.
>
> And, then when he rolled up to us I looked and it was the same guy that was staring at us, which is him. [J.A. 88a-89a (France).]

Thompkins's van, driven by Eric Purifoy, caught up and pulled along side Morris's car. The two vehicles

stopped in front of a Rite-Aid pharmacy in the strip mall. J.A. 165a-167a (Purifoy). Morris's driver's side window was lined-up with the front passenger side window of the van. J.A. 41a-42a (Graves); J.A. 69a-71a (France). Thompkins, sitting in the front passenger seat of the van, asked Morris, "what you say, big dog?" J.A. 40a-41a, 45a (Graves); 71a-72a (France); J.A. 169a (Purifoy). He then produced a .45 caliber semi-automatic handgun and fired numerous shots at Morris's car. J.A. 72a-74a (France).

France was struck by a bullet with each step as he attempted to flee into the Rite-Aid. J.A. 73a-76a (France). Morris was shot to death. J.A. 73a (France); J.A. 52a-59a (Pacris). Morris was struck four times, with one bullet fatally damaging his liver, kidney, heart, and lung. J.A. 52a-57a (Pacris). The angle of the wounds was consistent with Morris falling or lunging away from the shooter. J.A. 60a-61a (Pacris).

Before trial, France positively identified Thompkins as the shooter from a photograph taken from a surveillance camera. J.A. 105a-106a (Schneider). The delicatessen had a surveillance camera from which still photographs were generated depicting the group of men who left it immediately before the shooting. J.A. 101a-104a (Schneider). One of the photographs – blown up to poster size for the jury – indisputably depicted Thompkins and Eric Purifoy. J.A. 107a (Schneider); J.A. 112a-113a (Stephens); J.A. 138a (Helgert); J.A. 173a (Purifoy).

France, who was recovering from his wounds in the hospital the day after the shooting, immediately and with certainty, identified Thompkins as the shooter and Purifoy as the driver from this photograph. J.A. 76a-82a

(France); J.A. 103a-105a (Schneider). The officer who showed him the photograph testified that:

> [France] immediately pointed to the first individual in the photograph. Pointing at him saying, 'he was the shooter.' He then went left to right pointing at the second individual saying, 'he was the driver.' And he couldn't identify the third individual. [J.A. 105a (Schneider).]

Accordingly, many essential details of the crime were not seriously disputed at trial. There was no question that the shots came from Thompkins's van. J.A. 33a-34a (Biesley); J.A. 35a-38a (Szabo); J.A. 38a-42a, 43a-45a (Graves); J.A. 47a-52a (Rube); J.A. 66a-74a (France). And the fact that Purifoy and Thompkins were correctly identified as occupants of the van was essentially uncontested in light of the surveillance photographs and positive identification and recovery of Thompkins's van. The defense theory was that Purifoy was the shooter and that Thompkins was merely present in the van. J.A. 204a (Defense closing).

Purifoy saw the photograph from the delicatessen on television and identified himself, Thompkins, and another man, Myzell Woodward, as appearing in it. J.A. 173a (Purifoy). Purifoy contacted the Southfield Police Department and then turned himself in. J.A. 138a (Helgert); 173a-177a (Purifoy). Thompkins, on the other hand, stripped his van, hid it behind a house, changed his identity, and fled to Ohio. J.A. 108a-110a (Farquhar); J.A. 137a, 142a-144a (Helgert).

While Thompkins was still at large, Purifoy was tried on charges of first-degree murder based on the theory that he aided and abetted the shooter,

Thompkins. J.A. 139a-141a (Helgert); J.A. 177a (Purifoy). France testified at Purifoy's trial that Purifoy was the driver of the van and that Thompkins was the shooter. J.A. 82a-85a, 99a (France). At Thompkins's trial, without objection, the prosecutor asked Purifoy the outcome of his trial, and Purifoy answered: "I was acquitted of the murder charge and found guilty on weapons charges." J.A. 177a-178a (Purifoy). Purifoy testified that he received a six-to-ten year sentence, and that he had an appeal pending. J.A. 177a-178a (Purifoy). Purifoy testified that no immunity or promises were given to him in exchange for his trial testimony against Thompkins, but a letter noting his cooperation would be sent to the Department of Corrections. J.A. 178a (Purifoy).

Helgert testified more specifically that Purifoy was acquitted of the murder and assault charges, and convicted of having a concealed weapon in a motor vehicle. J.A. 140a-141a (Helgert). Helgert explained that Purifoy subsequently pled guilty to two counts of felony-firearm and one count of felon in possession of a firearm under an aider and abettor theory. J.A. 140a-141a (Helgert).

The fact of Purifoy's trial was used by the prosecutor to put into context letters that were sent from Purifoy to Thompkins after Purifoy's case ended and Thompkins was arrested. The letters contained statements by Purifoy to Thompkins claiming that they were both innocent. J.A. 178a-179a (Purifoy). Some letters expressed disappointment that Thompkins's family was regarding Purifoy as a "snitch" and a "rat." J.A. 179a-180a (Purifoy). One letter offered to send a copy of Purifoy's trial transcript to Thompkins to prove that he did not place the blame on Thompkins for the crime. J.A. 180a (Purifoy). Purifoy testified that in none

of the letters he received back from Thompkins did Thompkins accuse Purifoy of having mixed-up the roles by claiming that Purifoy knew in truth that Thompkins was the driver and Purifoy was the passenger. J.A. 180a-182a, 187a-188a (Purifoy). The letters and responses thus tended to rebut any argument by the defense that Thompkins was the driver and Purifoy the passenger/shooter.

The prosecutor suggested in examining Purifoy that some of the letters appeared to give Thompkins a trial strategy whereby Thompkins should claim that both he and Purifoy hit the floor when the gun-fire started and that perhaps Woodward was the shooter as Woodward was already facing capital murder charges for a different crime in Ohio. J.A. 182a-189a (Purifoy). Defense counsel attempted to use the same letters to impeach Purifoy's credibility and to suggest that Purifoy made-up a story about the incident and wanted to place the blame for the shooting on either Thompkins or Woodward. J.A. 190a-193a (Purifoy).

Before Ohio police officers were finally able to capture Thompkins, he led them on a foot chase. J.A. 118a-123a (Damschroder). Even after he was apprehended, he gave the officers a false name and false identification documents and never admitted his true identity to the Ohio authorities. J.A. 130a-132a (Parrish); J.A. 118a-123a (Damschroder).

Purifoy's testimony largely tracked that of the eyewitnesses' but added the fact that Thompkins was holding a pistol immediately after the shooting. Purifoy testified at Thompkins's trial that he was the driver and Thompkins was the passenger, and his account of the incident was consistent with that of France and the other eyewitnesses. J.A. 162a-170a (Purifoy). Purifoy

described how he, Thompkins, and Woodward left the delicatessen and walked to Thompkins's van. He said that he drove, Thompkins sat in the front passenger seat, and Woodward sat in the back. J.A. 164a (Purifoy). Purifoy, however, testified that at the critical moment – when the shots started to ring out – he happened to be bent over adjusting the radio. J.A. 167a-168a (Purifoy). He claimed that Thompkins was holding a pistol after the shooting, but he did know whether the shots came from the victims or from Thompkins. J.A. 170a-172a, 178a-179a (Purifoy). After the shots Thompkins asked Purifoy, "What the hell [are] you doing? Pull off." Purifoy pulled the van slowly out of the lot and drove off. J.A. 169a-172a (Purifoy).

A friend of Thompkins, Omar Stephens, came forward to authorities while he was being held on an unrelated matter in Wayne County, Michigan. J.A. 154a-156a (Helgert). Stephens testified that while watching a news report about the shooting on television, he recognized Thompkins from the delicatessen photograph. J.A. 112a-113a (Stephens). He asked Thompkins during a telephone conversation about what had happened and Thompkins told him, "he had popped them n-----s up," because they "got into it." J.A. 114a (Stephens).

Thompkins never mentioned Purifoy during the telephone conversation with Stephens and never attempted to blame Purifoy. J.A. 115a (Stephens). Stephens knew Thompkins to carry a .45 automatic pistol. J.A. 116a-117a (Stephens). Stephens also described how Thompkins told him that he had to abandon his van after the incident but first sold the stereo and gold rims. J.A. 115a-116a (Stephens). This was corroborated by the actual condition of the van when it was discovered by the police.

The prosecutor started his closing argument with the fact that Purifoy had been tried under an aider and abettor theory:

> Ladies and Gentleman, this is a case about the relationship between these two people.
>
> At Eric Purifoy's trial the Jury had to find, in order to find him guilty of First Degree Murder, that he drove up to that Rite-Aid and sat there, thereby assisting Van Thompkins.
>
> He sat there and he watched Van Thompkins and allowed Van Thompkins to shoot somewhere between seven and ten shots and then he calmly drove away. That is what they had to find to find him guilty. [J.A. 201a-202a.]

The prosecutor then used this fact to explain why Purifoy testified that he did not see the shooting itself. The prosecutor suggested the testimony was false:

> So what does he do? He twists it and indicates he hits the floor. Because, by hitting the floor he doesn't know what is going on.
>
> Is that believable? Did Eric Purifoy's Jury make the right decision? I'm not here to judge that. You are not bound by what his Jury found. Take his testimony for what it was, a twisted attempt to help not just an acquaintance but his tight buddy. [J.A. 202a.]

At no point did the prosecutor suggest that the fact of Purifoy's acquittal could be used to infer Thompkins's guilt, or that the jury had an obligation to find Thompkins guilty because someone had to pay, and it could no longer be Purifoy. If anything, the counter-inference was more plausible: if the theories at the two trials were the same, then the result should also be the same – both should be found *not* guilty. The prosecutor's comments were designed to counter this inference.

In Thompkins's closing argument, his counsel focused on the possibility that it was Purifoy who was the shooter and that there was no evidence to justify a finding that Thompkins was guilty under an aiding-and-abetting theory: "he's either the shooter or he is not guilty. And there is no evidence whatsoever that he is the shooter." J.A. 205a. On rebuttal the prosecutor disagreed, and he suggested that even if the jury believed Purifoy to be the shooter, that they convict Thompkins on an aiding-and-abetting theory. J.A. 205a-206a.

The trial court instructed the jury at least four times that "You must decide what the facts of this case are. This is your job and nobody else's." J.A. 207a, 208a-209a, 228a. It instructed them on the presumption of innocence. J.A. 207a-208a. And it instructed them regarding the prosecutor's burden to prove Thompkins's guilt by proving each element of the offense beyond a reasonable doubt. J.A. 207a-208a. It also cautioned the jury regarding Purifoy's testimony:

> A witness says that he took part in a crime that the defendant is charged with committing.

> The witness has already been convicted out of the charges arising out of the commission of that crime. Such a witness is called an accomplice. You should examine accomplice's testimony closely and be very careful in accepting it.
>
> You may think about whether an accomplice's testimony is supported by other evidence, because then it may be more reliable. However, there is nothing wrong with the prosecutor using an accomplice as a witness.
>
> You may convict the defendant based only on the accomplice's testimony, if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.
>
> * * *
>
> In general you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. [J.A. 213a-214a.]

The court instructed the jury on the elements of aiding and abetting in addition to the ordinary elements of the charged crimes. J.A. 216a-217a. The jury found Thompkins guilty of first-degree murder, assault with intent to commit murder, and related firearm charges.

In addition to the *Miranda* claim discussed above, Thompkins alleged in his State court appeal that his counsel was ineffective for failing to seek a special jury instruction that informed the jury that the evidence of

Purifoy's acquittal could only be used to assess Purifoy's credibility based on his motives and not as substantive evidence.

As part of the direct appeal process, Thompkins's appellate counsel filed a motion for a new trial, alleging among other claims, the ineffective assistance of counsel claim at issue here. The trial court issued an opinion and order denying the motion without a hearing. The opinion noted that Thompkins was required to "show a reasonable probability that, but for the errors, the result of the proceeding would have been different." J.A. 235a (Opinion Denying Motion For New Trial). The trial court went on to find: "[h]owever, the court does not find that, but for the errors, the results of the proceeding would have been different." J.A. 236a (Opinion Denying Motion For New Trial).

The claim was renewed in the Michigan Court of Appeals. The court stated that "[t]o establish a claim of ineffective assistance of counsel, the burden is on the defendant to show that counsel made errors so serious that he was not functioning as the 'counsel' guaranteed by the Sixth Amendment and the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial." Pet. App. 79a. The court "agree[d] with the trial court that defendant was not prejudiced by defense counsel's failure to request certain jury instructions. Although the court did not specifically instruct the jury that it could consider Purifoy's conviction only for purposes of his credibility, the record does not disclose an attempt to argue that conviction for an improper purpose." Pet. App. 80a. The Michigan Supreme Court denied leave to appeal. Pet. App. 73a.

3. Federal habeas proceedings.

Thompkins raised his *Miranda* and ineffective assistance of counsel claims, as well as others, in his federal habeas petition. Pet. App. 40-42a. The district court denied the petition without holding a hearing. With respect to the *Miranda* claim, the district court found that "[t]he record does not establish that Petitioner clearly and unequivocally invoked his right to remain silent after Helgert advised him of his *Miranda* rights." Pet. App. 67a. The district court noted that Thompkins did participate in the conversation with Helgert by nodding his head or responding "yeah," "no," or "I don't know" in response to the dialogue. Pet. App. 67a. The district court found that the refusal to sign the waiver form, provide a written statement, and to answer some questions, did not constitute an unequivocal assertion of his right to remain silent. Pet. App. 68a.

The district court also rejected Thompkins's ineffective assistance of counsel claim. The court found that "effective counsel would have requested such an instruction[.]" Pet. App. 63a. But it concluded that the introduction of evidence regarding Purifoy's convictions did not render Thompkins's trial fundamentally unfair. Pet. App. 63a.

The Sixth Circuit reversed on both issues. With respect to the *Miranda* claim, the court found that the State court adjudication of the claim involved both an unreasonable application of the facts and an unreasonable application of clearly established federal law. Pet. App. 16a, 22a. The Sixth Circuit found that the record did not support the Michigan Court of Appeals' determination that Thompkins interacted with Helgert but showed that he was silent for two hours and forty-five minutes. Pet. App. 24a. The Sixth Circuit also found

that the Michigan Court of Appeals unreasonably determined that Thompkins waived his rights. It found that Thompkins's persistent silence in the face of questioning unequivocally indicated that he did not wish to waive his right to remain silent. Pet. App. 29a.

The Sixth Circuit likewise reversed the district court's denial of the ineffective assistance of counsel claim. The Sixth Circuit accepted the district court's finding that counsel performed deficiently by failing to request a jury instruction limiting consideration of Purifoy's acquittal to his credibility. Pet. App. 34a. The Sixth Circuit then found that the failure to request the instruction was prejudicial as well. It found that Thompkins's central strategy at trial was to blame Purifoy for the murder. It concluded that evidence of Purifoy's acquittal "likely exerted powerful influence on the jury to convict Thompkins of murder. If the jury did not convict Thompkins, the jury knew that no one would be convicted for killing Morris and shooting France." Pet. App. 35a.

SUMMARY OF ARGUMENT

Congress has instructed the federal courts that habeas corpus relief must be denied to State prisoners unless the State court acted unreasonably in light of this Court's clearly established pronouncements. In this case, the Sixth Circuit exhibited a readiness to attribute error that is inconsistent with the presumption that State courts know and follow the law. The Sixth Circuit found two independent bases for granting habeas relief and reversed a murder conviction where none of the previous four courts reviewing the matter found any errors warranting relief. In setting aside the murder conviction, the Sixth Circuit misapplied *Miranda* and *Strickland* and mistakenly determined that the Michigan Court of Appeals' application of those cases was unreasonable. The decision of the Sixth Circuit should be reversed.

Miranda and its progeny protect a criminal defendant's right against self-incrimination by requiring the police to inform a suspect of the protections afforded by the Fifth Amendment before interrogating him in a custodial setting. The prosecution may only introduce a statement where a suspect has waived these rights. *Butler* makes clear that the prosecution may overcome the presumption against waiver where the suspect acknowledges his rights, does not invoke them, and engages in a course of conduct that implies waiver, such as by voluntarily answering questions. The Michigan Court of Appeals here reasonably applied this principle where the police informed Thompkins of his rights, he acknowledged his rights, participated sporadically in the interview, and then he impliedly waived them by voluntarily answering questions that incriminated him. The Sixth Circuit's determination that more was necessary to obtain a waiver of Thompkins's rights is not required by this Court's precedents. Michigan did not

unreasonably apply *Miranda* and *Butler*. In order to reject the Michigan ruling, the Sixth Circuit made adverse factual findings, and did not defer to the findings of the State courts. But there is no clear precedent from this Court that required the Sixth Circuit to reject the finding that Thompkins had impliedly waived his rights by expressly acknowledging them after being warned and voluntarily answering questions in which he incriminated himself. There was no Fifth Amendment violation.

Strickland provides that the deficient performance of counsel requires relief only where it resulted in prejudice. The Sixth Circuit's determination that the Michigan courts were unreasonable was predicated on a fundamental misunderstanding of this Court's precedent. The Sixth Circuit's analysis of prejudice rested on the possibility that Thompkins's jury determined that Purifoy could not have been the shooter since he was acquitted, and that this undermined Thompkins's theory of innocence. But Purifoy was charged as an aider and abettor in his case, and the previous jury rejected the same theory that was being advanced at this trial: Purifoy as the driver and Thompkins as the shooter. No one claimed that Purifoy was the shooter in the first trial so his acquittal did not impeach Thompkins's theory here. The Sixth Circuit also relied on the possibility that Thompkins's jury might have disregarded its oath and instructions and convicted Thompkins out of vengeance and the desire to see *someone* pay for the crime. But that is not the sort of speculative prejudice that *Strickland* was aimed at avoiding. And the proposed instruction would have had no bearing on the jury verdict in light of the overwhelming evidence of Thompkins's guilt. The State court did not act unreasonably in denying this claim. There was no Sixth Amendment violation.

ARGUMENT

I. The Michigan Court of Appeals did not act unreasonably in rejecting Thompkins's *Miranda* claim.

The Sixth Circuit erred in finding that the Michigan courts unreasonably rejected Thompkins's Fifth Amendment claim. This error is predicated on two mistakes.

First, the Sixth Circuit failed to abide by two limitations imposed by AEDPA. Under 28 U.S.C. § 2254(d)(2) and (e)(1), the Michigan State courts' factual determinations were entitled to deference. The record supported the findings of the Michigan courts that Thompkins acknowledged his rights, "sporadically" participated in the interview, and that he voluntarily answered questions. And under 28 U.S.C. § 2254(d)(1), a federal court may only grant relief where a State court decision is contrary to or involved an unreasonable application of clearly established Supreme Court precedent. This Court has not clearly established that a court must reject the finding of an implied waiver when a suspect acknowledges his rights, does not invoke them, sporadically participates in a police interview, and then voluntarily answers questions.

Second, under a proper reading of *Miranda* and *North Carolina v. Butler*, the prosecution may carry its burden of rebutting the presumption against waiver where the police have provided the in-custody suspect his rights under *Miranda*, the suspect expressly acknowledges those rights but does not invoke them, and then voluntarily answers questions. In that situation, a suspect has been afforded "[t]he primary protection" of *Miranda*, namely, being "adequately advised of his

rights and given an opportunity to exercise them."[3] This is what occurred here. The Michigan Court of Appeals was not unreasonable in reaching this conclusion.

For this reason, the police may properly ask questions of an in-custody suspect after providing that suspect with his rights under *Miranda* where the suspect expressly acknowledges those rights, and the suspect does not invoke them. This rule of conduct is consistent with *Miranda* and reflects the practice of the police in obtaining implied waivers under *North Carolina v. Butler*.

Finally, the Michigan Court of Appeals reasonably determined that Tompkins did not invoke his right to be silent. Even if his conduct is viewed as an equivocal assertion of his right to remain silent, the police would have no obligation to cease questioning. The rule in *Davis v. United States* should apply to the equivocal assertion of a right to remain silent just as it does to an equivocal assertion of the right to an attorney.

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[3] *Davis v. United States*, 512 U.S. 452, 461 (1994)("primary protection"); *Miranda v. Arizona*, 384 U.S. 436, 496 (1966)("adequately advised . . .").

A. Thompkins impliedly waived his right to remain silent and his right to an attorney.

1. The Michigan courts were not unreasonable in concluding that Thompkins waived his rights under Miranda *when he acknowledged his rights, did not invoke them, engaged in some limited verbal and non-verbal communications, and then voluntarily answered questions.*

The Sixth Circuit was sitting in review in habeas corpus, and was limited to this Court's clearly established precedent under 28 U.S.C. § 2254(d) in reviewing whether there was a valid implied waiver. But this Court has not provided clear guidance about whether the conduct at issue here would constitute a waiver. In other words, there is no clearly established law from this Court that requires a court to reject a finding of an implied waiver where a suspect acknowledges his rights, does not invoke them, participates in the interview in a limited way, and then voluntarily answers questions. In order to overcome this barrier to relief, the Sixth Circuit rejected the Michigan courts' factual determinations and instead found that Thompkins was silent during the interview. The record, however, supports the findings of the Michigan courts.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend V. This amendment was made applicable to the States by the Fourteenth Amendment in *Malloy v. Hogan*.[4] The

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[4] *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

protection against self-incrimination has been implemented by the procedures required by this Court in its decision in *Miranda v. Arizona*.[5]

In *Miranda*, this Court concluded that there are two necessary components to protect this Fifth Amendment right. First, prior to any questioning, an in-custody suspect must be informed of his right to remain silent, that anything he says may be used against him in court, that he has the right to an attorney, and that one will be appointed for him if he is unable to afford one.[6] Second, the individual may knowingly and intelligently waive these rights, and the prosecution may not introduce any statement from a suspect at trial "unless and until such warnings and waiver are demonstrated by the prosecution[.]"[7]

Moreover, under *Miranda*, the prosecution has the burden of proving admissibility.[8] This Court characterized as "fundamental" the requirements of warnings and a waiver before the admission of a suspect's statement.[9] The waiver must be voluntary, knowing, and intelligent.[10] This means that the waiver must be a product of a free and deliberate choice, and not the product of deception, and that it was made with an awareness of the nature of the right being abandoned and the consequences of abandoning it.[11] This Court in *Colorado v. Connelly* further explained that the State

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[5] *Miranda*, 384 U.S. at 436.
[6] *Miranda*, 384 U.S. at 479.
[7] *Miranda*, 384 U.S. at 479.
[8] *Miranda*, 384 U.S. at 475.
[9] *Miranda*, 384 U.S. at 476.
[10] *Colorado v. Spring*, 479 U.S. 564, 573 (1987); *Moran v. Burbine*, 475 U.S. 412, 421 (1986).
[11] *Spring*, 479 U.S. at 573; *Moran*, 475 U.S. at 421.

need "prove waiver only by a preponderance of the evidence."[12]

In *Miranda*, this Court then outlined the requirements for proof of a valid waiver once a suspect had been informed of his rights. It termed this a "heavy burden" that is carried by the prosecution.[13] A valid waiver "will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[14]

In *North Carolina v. Butler*, however, this Court clarified that the waiver need not be expressly given, but may be implied.[15] Of course, this Court reiterated that the "prosecution's burden is great" and also stated that "[t]he courts must presume that a defendant did not waive his rights."[16] *Butler* also reiterated that "mere silence" was not enough, but stated that silence "coupled" with both an understanding of one's rights and a "course of conduct indicating waiver" might support the conclusion that there has been a waiver.[17] In other words, the waiver may be "inferred from the actions and words of the person interrogated."[18] This Court noted that the question of waiver must be examined in light of the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the suspect.[19]

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[12] *Colorado v. Connelly*, 479 U.S. 157, 168 (1986).
[13] *Miranda*, 384 U.S. at 475.
[14] *Miranda*, 384 U.S. at 475.
[15] *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).
[16] *Butler*, 441 U.S. at 373.
[17] *Butler*, 441 U.S. at 373.
[18] *Butler*, 441 U.S. at 373.
[19] *Butler*, 441 U.S. at 374-375, citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The facts of the *Butler* case are important to identifying what "course of conduct" implicates this implied-waiver standard. In *Butler*, the suspect acknowledged his rights, refused to sign the waiver at the bottom of the advice-of-rights form, but agreed to speak with the police. He "said nothing when advised of his right to the assistance of a lawyer" and then made an inculpatory statement.[20] By remanding the matter to the North Carolina Supreme Court for it to review in light of the proper standard, this Court left open the possibility that such conduct would constitute a waiver even though the suspect had said nothing about waiving his right to counsel.

In the wake of *Butler*, many lower courts, including federal circuits and state supreme courts, have held that a suspect who acknowledges his rights and does not invoke them, who is not subject to coercion, and who answers questions voluntarily has impliedly waived his rights under *Butler*.[21] An apparent minority of courts,

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[20] *Butler*, 441 U.S. at 373.

[21] *See*, e.g., *United States v. Velasquez*, 626 F.2d 314, 320 (3rd Cir. 1980)("We hold that on this record Pauline's subsequent willingness to answer questions after acknowledging that she understood her *Miranda* rights is sufficient to constitute an implied waiver under *Butler*."); *United States v. Cardwell*, 433 F.3d 378, 389-390 (4th Cir. 2005)("Because Hinson had been fully informed and indicated his understanding of his *Miranda* rights, his willingness to answer Agent High's question is as clear an indicia of his implied waiver of his right to remain silent as we can imagine."); *United States v. Nichols*, 512 F.3d 789, 798 (6th Cir. 2008)("Thus, a failure to invoke one's right to remain silent – after being informed of and indicating an understanding of that right – functions as the equivalent of a waiver."); *United States v. Binion*, 570 F.3d 1034, 1041 (8th Cir. 2009)("Since Binion had been informed of his rights and had neither invoked his Fifth Amendment privilege nor requested an attorney, his decision to volunteer an incriminating response was an intelligent waiver of that right."); *United States v. Washington*, 462 F.3d 1124, 1134 (9th Cir. 2006)("Washington takes the curious

in contrast, have found that there was no waiver despite the acknowledgement of rights and the voluntary answering of questions.[22]

Since *Butler*, this Court has not delineated what course of conduct would be sufficient to manifest such an implied waiver. In the absence of such guidance, the decision of the Michigan courts on this issue cannot be an unreasonable application of clearly established Supreme Court precedent. This Court's decisions regarding what constitutes "clearly established" precedent support this conclusion. For example, in *Wright v. Van Patten*, this Court in a per curiam opinion examined the question whether an attorney was presumptively ineffective for participating at his client's plea hearing by speaker phone.[23] The State courts had denied relief, but the Seventh Circuit determined this was a structural error under *United States v. Cronic* and

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position that the FBI agents should have construed his statement, 'I agree to listen,' to mean that the agents were not permitted to talk to Washington. . . . A person waives the right to remain silent if, after being informed of that right, the person does not invoke that right."). *See also* generally 2 W. LaFave, J. Israel, N King & O. Kerr, Criminal Procedure § 6.9(d)(3d 2007), p. 831 ("But what if the defendant expresses an understanding of the *Miranda* warnings he has received and thereafter an incriminating statement is obtained from him? In the language of *Butler*, does this amount to a showing of 'an understanding of his rights and a course of conduct indicating waiver'? Several courts have answered this question in the affirmative.")(listing cases, including state supreme court decisions).

[22] See 2 LaFave, et al, Criminal Procedure, § 6.9(d)(3d 2007), pp. 831-832 ("There is, however, authority to the contrary."), citing *United States v. Christian*, 571 F.2d 64 (1st Cir. 1978); *Kansas v. Baker*, 2 Kan. App. 2d 395; 580 P.2d 90 (1978). *See also United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988).

[23] *Wright v. Van Patten*, 552 U.S. 120, 121 (2008).

granted habeas relief.[24] This Court reversed because there was no established Supreme Court precedent on this point – "No decision of this Court, however, squarely addresses the issue in this case."[25] *Wright* required that there be a "clear[] hold[ing]" from this Court on the question at issue.[26]

Similarly, in *Carey v. Musladin*, another habeas case, this Court examined whether the displaying of buttons by the victim's family during the defendant's trial deprived the defendant of a fair trial.[27] This Court initially noted that it had examined possible error in the conduct of trials based on state-sponsored conduct. It then noted that the lower federal courts had diverged in their decisions applying this precedent, some applying it to the conduct of spectators, and others not. In light of this divergence, this Court concluded that there was no clearly established Supreme Court law for the State court to apply.[28] The same point is applicable here.

There is no clearly established precedent from this Court that required the State court to conclude that Thompkins's conduct was not an implied waiver. Thompkins acknowledged his rights but did not invoke them, sporadically participated in the interview by providing a few responses, and then voluntarily answered questions that incriminated him. He waived his rights when he incriminated himself armed with the knowledge that he was under no obligation to answer questions. The Michigan Court of Appeals reasonably concluded that he waived his rights. There is no

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[24] *Wright*, 552 U.S. at 122; *United States v. Cronic*, 466 U.S. 648 (1984).

[25] *Wright*, 552 U.S. at 125.

[26] *Wright*, 552 U.S. at 125-126.

[27] *Carey v. Musladin*, 549 U.S. 70, 72 (2006).

[28] *Musladin*, 549 U.S. at 76-77.

precedent from this Court that requires a different result. Moreover, there is no basis for concluding that its decision was not merely erroneous, but was objectively unreasonable.[29]

The Sixth Circuit reframed the issue by rejecting the Michigan courts' factual findings and concluding instead that Thompkins was silent throughout the interview. This is not a case where a suspect remained silent. Not only had he provided a few responses during the interview, *but he had expressly acknowledged his rights at the outset of the interrogation.* The record supported the findings of the Michigan courts. The Sixth Circuit should have deferred to the State courts' findings.

At the outset of the interview, the police provided Thompkins his rights under *Miranda*. Using the notification form, Detective Helgert had Thompkins read out loud his right under the fifth point from the form that he had the right to remain silent and the right to speak with an attorney J.A. 8a-10a, 146a. In this way, Detective Helgert was able to confirm that Thompkins could read. Detective Helgert then read to Thompkins the four traditional rights under *Miranda*, i.e., that he had the right to remain silent, that anything he said can be used against him, that he had a right to an attorney before answering any questions, and that if could not hire an attorney, one would be appointed to represent him. J.A. 8a-10a, 146a.

Detective Helgert then explained that he believed that he asked Thompkins whether he understood his rights and that he thought that Thompkins answered with a verbal "yes." J.A. 9a-10a. From this testimony,

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[29] *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

the state trial court adopted the express acknowledgement as a factual finding. J.A. 28a ("the evidence showed that the detectives read [Thompkins] his rights, and that he responded that he understood them"). Detective Helgert explained that he had attempted to get Thompkins to sign the form, but that Thompkins refused:

> We didn't start interrogating him, but we did tell him, because we believed it was necessary for him to waive his Rights. We would advise him of his Rights, we would like him to sign the Form and indicate that in writing so we could more easily move forward and document that and then let him tell his side of the story. [J.A. 14a.]

Although Thompkins did not sign the acknowledgement form, he never stated that he wanted an attorney, that he was unwilling to talk, or that he was invoking his rights. J.A. 9a-10a.

At this point, Detective Helgert began to speak with Thompkins and to talk with him about the shooting, indicating that the police had spoken to Eric Purifoy and that this was his opportunity to tell his side of the story. J.A. 9a-10a. The interview lasted a total of approximately two-hours and forty-five minutes. J.A. 8a-12a, 15a-16a. Detective Helgert gave a candid description of the interview, in which he did most of the talking, characterizing it as "nearly a monologue," J.A. 17a, but said unambiguously that Thompkins "continued to talk with us very sporadically." J.A. 9a. Despite the fact that Thompkins was "largely silent," he did provide responses during the interview:

Q And, you said there were times that he responded, correct?

A Yes.

Q And, his response for what, to engage you in conversation, or simply say something to the effect that 'I'm not talking to you.'

A Never 'I'm not talking to you.' Sometimes it would be eye-contact, sometimes it would be a nod of the head, sometimes, I know the words, 'I don't know' was quite prevalent. [J.A. 21a.]

These responses were only a few words long, "a 'yeah', or a 'no', or 'I don't know.'" J.A. 23a. Thompkins never asked for the interview to stop.

After two hours and fifteen minutes, Detective Helgert changed his approach and asked him whether he believed in God. J.A. 10a, 16a-17a. Thompkins then made eye contact, his eyes welled up with tears, and he answered "yes." J.A. 11a. And when asked whether he prayed for forgiveness for "shooting that boy down," he answered "yes." J.A. 11a.

Based on this record, the Michigan Court of Appeals rightly found – consistent with the state trial court – that after Detective Helgert informed Thompkins of his rights under *Miranda*, that Thompkins "verbally acknowledged that he understood those rights" and that he thereafter "continued to talk with the officer, albeit sporadically," by "answer[ing] questions with brief responses, or by nodding his head[.]" Pet. App. 75a. The

Michigan Court of Appeals determined that Thompkins did not say he did not want to talk, but rather that he waived his rights in voluntarily answering the questions of Detective Helgert. Pet. App. 75a-76a. The factual determinations underlying this conclusion were reasonable, and should have been accepted by the Sixth Circuit.

This is true whether this issue is examined under 28 U.S.C. § 2254(d)(2) or (e)(1). Under (d)(2), Thompkins had the burden of showing that a decision was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceedings"; while under (e)(1), Thompkins had the burden of overcoming "the presumption of correctness" applied to the factual determinations of the State court with clear and convincing evidence. In *Wood v. Allen* (08-9156), currently pending before this Court, the relationship between these two provisions is at issue. Under either provision, the finding that Thompkins acknowledged his rights and participated on some occasions during the interview are predicate facts entitled to AEDPA deference.[30]

In rejecting the factual findings of the Michigan courts as "objectively unreasonable" under (d)(2), the Sixth Circuit asserted that Thompkins "was silent" during the entire interview:

> Contrary to the state court's statement, the evidence demonstrates that Thompkins was silent for two hours and forty-five minutes. [Pet. App. 24a.]

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[30] *Miller v. Fenton*, 474 U.S. 104, 112 (1985)("subsidiary factual questions, such as . . . whether in fact the police engaged in the intimidation tactics alleged by the defendant . . . are entitled to the § 2254(d) presumption")(now § 2254(e)).

The Sixth Circuit also asserted that "Thompkins's persistent silence" in the face of questioning sent the "unequivocal" message that he did not wish to waive his rights. Pet. App. 29a.

But these factual assertions are contradicted by the record. Thompkins was not merely silent after he was informed of his rights. Rather, Thompkins expressly acknowledged his rights, which in *Butler* was a significant fact. And then Thompkins provided some responses even if few in number during the interview, including answering "yeah," and "no," and saying "I don't know" in respond to Detective Helgert's inquiries. J.A. 23a. The Sixth Circuit was wrong to completely discount these facts.

The Sixth Circuit noted that the questions to which Thompkins responded were "unidentified" and concluded that "without the context" there was not adequate support for the conclusion that "Thompkins's conduct indicated a waiver of his rights." Pet. App. 25a, 27a. But *Butler* did not require this. There was no evidence on the record from *Butler* that the in-custody suspect had said anything about waiving his right to an attorney. He had indicated a willingness to talk after having refused to sign the waiver, but "said nothing when advised of his right to the assistance of a lawyer."[31]

The suggestion from *Butler* is that he may have impliedly waived his right to counsel because otherwise he would not have agreed to speak. The decision to agree to speak with the officers is inconsistent with the exercise of his right to have an attorney present. Consequently, this might have been an implied waiver.

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[31] *Butler*, 441 U.S. at 370-371.

The same is true here. Thompkins had acknowledged that he had a right to remain silent and he could exercise that right at any time. The decision to answer direct questions about his belief in God and about his prayer for forgiveness for his criminal conduct was inconsistent with the exercise of his right to remain silent. In this way, his course of conduct indicated that he was waiving his right to remain silent.[32]

In the absence of its unsupported factual findings, the Sixth Circuit would have no authority to revisit the decision of the Michigan courts because even though this Court has stated that "mere silence" is inadequate, it is clear under *Butler* that an acknowledgement of one's rights followed by answering questions might signify a waiver.

Thus, accepting the factual determinations of the Michigan courts as is required by AEDPA, the ruling by the Michigan courts that there was an implied waiver is not an unreasonable application of this Court's precedent. The presumption of non-waiver from *Butler* was overcome by the fact that Thompkins acknowledged his rights, did not invoke them, participated sporadically but voluntarily during the interview, was not coerced by the police, and then with knowledge of his rights, answered their questions and incriminated himself. The ruling that he waived his right to remain silent and to have an attorney was not unreasonable.

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[32] As the lower federal courts have noted, the decision to answer some questions but not others does not constitute an invocation of one's right to remain silent, but rather a limited waiver of those rights. *See*, e.g., *United States v. Eaton*, 890 F.2d 511, 514 (1st Cir. 1989)("Rather, he simply says that whether he will 'waive his rights and answer' depends on the questions asked. The district court found a knowing, voluntary 'waiver.' The law permits a 'selective' waiver.").

2. The Sixth Circuit decision was also predicated on a legal error – it failed to recognize that an in-custody suspect who has been properly instructed on his Fifth Amendment rights and has acknowledged them impliedly waives them when he elects to voluntarily answer questions.

The fatal legal error of the Sixth Circuit decision was to fail to understand *Miranda* in light of this Court's decision in *Butler*. The core of *Miranda* is the police obligation to inform a suspect of his rights so that the suspect is able to make a knowing decision about whether to exercise these rights. This is accomplished where (1) the warnings are properly given; (2) the suspect acknowledges these rights; and (3) the suspect has an opportunity to exercise these rights. After the prosecution proves these three points, a suspect who voluntarily answers questions has waived his right to remain silent and his right to speak with his attorney.

In rejecting the conclusion that a valid waiver can arise from the "silence of the accused after warnings are given" or from "mere silence,"[33] this Court seeks to ensure that the provision of the rights does not become an empty ritual that does not guarantee that the suspect is aware of his rights and can act on them. Thus, when the suspect either acknowledges his rights or makes expressly clear that he understands them after the rights have been provided, the interests underlying *Miranda* and its protection of the Self-Incrimination Clause of the Fifth Amendment are secured.

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[33] *Miranda*, 384 U.S. at 475; *Butler*, 441 U.S. at 373.

The paramount holdings of *Miranda* relate to the procedural safeguards that must be employed to protect a person's right against self-incrimination: an in-custody suspect must be warned of his rights before being questioned; the suspect must be given an opportunity to knowingly and intelligently waive these rights and agree to answer questions and make a statement; and the prosecution must provide evidence of warnings and waiver before it may introduce evidence obtained from this process.[34]

The overarching theme of *Miranda* was the need to inform a suspect of his rights at the outset of the interrogation to ensure that any "statements were truly the product of free choice."[35] The protective procedures were necessary to dispel the inherently coercive environment created by custodial police interrogation:

> Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.[36]

This is the reason for the procedural safeguards.

In reaffirming *Miranda,* this Court in *Dickerson v. United States* held that *Miranda* established constitutional rules governing the admissibility of statements made during custodial interrogation.[37] In rejecting the basic challenge to the decision, this Court provided a narrow description of the "core ruling" of *Miranda*:

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[34] *Miranda*, 384 U.S. at 478-479.
[35] *Miranda*, 384 U.S. at 457.
[36] *Miranda*, 384 U.S. at 458.
[37] *Dickerson v. United States*, 530 U.S. 428, 431 (2000).

> If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.[38]

As noted in *Davis v. United States*, "[t]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves."[39] The statement introduced here was not unwarned. Just as the defendant in *United States v. Westover*, the companion case to *Miranda*, Thompkins here was also "adequately advised of his rights and given an opportunity to exercise them."[40] The prosecution did not violate Thompkins's right against self-incrimination under *Miranda* by introducing his statement here.

The controlling principles of *Miranda* are met where the ability of an in-custody suspect to make a voluntary choice to speak with the police is not compromised. This Court in *Oregon v. Elstad* permitted the admission of a statement for an in-custody suspect who was given his rights under *Miranda* and waived these rights, but only after the police had already briefly questioned him and received an incriminating response without providing any warnings.[41] Where this same posture was presented in *Missouri v. Seibert*, this Court distinguished *Elstad* because the violation did not arise from "good faith" but rather from a police tactic to

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[38] *Dickerson*, 530 U.S. at 443-444.

[39] *Davis*, 512 U.S. at 460 (1994).

[40] *Miranda*, 384 U.S. at 496.

[41] *Oregon v. Elstad*, 470 U.S. 298, 300, 318 (1985).

circumvent *Miranda*.[42] In rejecting the "two-stage interrogation" tactic, the plurality opinion in *Seibert* noted that the practice was designed to render the *Miranda* warnings "ineffective" by waiting until the suspect has already confessed before providing the rights so that the suspect would no longer view the rights as "genuine."[43] There was nothing about the interrogation process here that rendered the provision of Thompkins's *Miranda* rights meaningless.

More significantly, the decision of the Sixth Circuit failed to recognize how this Court's decision in *Butler* fundamentally expanded the basis for finding a valid waiver under *Miranda*. In *Miranda*, this Court stated "[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given."[44] In *Butler*, however, this Court held that a suspect who understood his rights, refused to sign a waiver form, but who agreed to speak with the police and then made a statement may have impliedly waived his right to counsel even though he said nothing about waiving his right to counsel.[45] Although the prosecution maintains the burden and must overcome the presumption, the Sixth Circuit decision was not sensitive to the "course of conduct" that might establish such an implied waiver in light of the purposes of *Miranda*.

The ruling of the Michigan Court of Appeals that Thompkins waived his right to remain silent and his right to an attorney when he voluntarily answered questions after expressly stating that he understood his

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[42] *Missouri v. Seibert*, 542 U.S. 600, 611, 615-616 (Souter, J., plurality opinion), 620 (Kennedy, J., concurring) (2004).
[43] *Seibert*, 470 U.S. at 611, 613 (Souter, J., plurality).
[44] *Miranda*, 384 U.S. at 470.
[45] *Butler*, 441 U.S. at 373, 375-376.

rights is consistent with the general rule that waivers must be voluntary, knowing, and intelligent. The evident concern underlying *Miranda* in its statement that a waiver cannot be presumed from "silence" is that the police will present the rights without the suspect having a real opportunity to elect whether to waive these rights. The key is that the suspect's rights be voluntarily relinquished.[46] This is what makes the express acknowledgement of the rights so critical for the *Miranda* inquiry. When a suspect receives the warnings, expresses understanding of the rights (knowing that any statement "may be used against you") and then voluntarily answering questions without invoking these rights, such a course of conduct will ordinarily constitute an implied waiver of these rights. Such was the case here.

This was also the basis of the federal district court's decision to deny Thompkins habeas relief. Pet. App. 67a-68a. This conclusion dovetails the analysis of many of the lowers courts under *Butler* as already noted.[47] The suspect in many of these cases immediately answered questions;[48] whereas here Thompkins did not immediately voluntarily answer questions, but provided responses sporadically during the interview before answering the questions about the fact that he prayed for forgiveness. But this difference is immaterial where Thompkins was expressly aware of his rights and knew

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[46] *See Miranda*, 384 U.S. at 476.

[47] *See* n 21 above.

[48] *See*, e.g., *Pennsylvania v. Bomar*, 573 Pa. 426; 826 A.2d 831, 843 (2003)("In light of the facts of record that appellant twice expressed his understanding of the *Miranda* rights, freely answered the questions posed to him immediately thereafter, and at no point indicated his unwillingness to participate in the interrogation without an attorney present, the record supports the trial court's finding that appellant knowingly and voluntarily waived his *Miranda* rights.").

that he could end the interview at any time. Once the rights are in fact understood, and will be honored where exercised, the "inherent pressures of the interrogation atmosphere" described in *Miranda* are dispelled.[49] Because Thompkins expressly knew that he could end the interview at any time, the fact that he did not do so but voluntarily answered questions incriminating himself indicated his decision to forgo his rights. The prosecution overcame the presumption that he did not waive his rights.

As a corollary point to the fact that there was no violation of Thompkins's rights under *Miranda,* the police also did not act improperly in continuing the interview after providing him his rights even though he did not expressly waive his rights. This conclusion follows from this Court's decision in *Butler*.

This Court in *Miranda* did not hold that the police could only engage in interrogation after the suspect had waived these rights. Rather, *Miranda* required that the warnings and waiver were necessary "prerequisites" to the admission of a suspect's statement at trial.[50] In explaining the process after the warnings, this Court stated that a suspect could invoke his right to remain silent, which would stop the questioning:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, *at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.* At this point he has shown that he intends to exercise his Fifth Amendment

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[49] *Miranda*, 384 U.S. at 468.

[50] *Miranda*, 384 U.S. at 476.

> privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.[51]

The unstated point here is that the police may begin its interrogation after the provision of warnings, but the prosecution only may introduce a statement after it establishes that a waiver occurred.

This Court in *Miranda* did not require that the waiver be obtained before the police begin asking questions. In its statement of its holding, *Miranda* only states that the suspect must "be warned prior to any questions" – not that the suspect must be warned and waive his rights before any questioning. A majority of this Court has not required more since then.[52] The central point of *Miranda* is that regardless of when the questioning occurs, a statement may only be introduced when the in-custody suspect has been provided his rights and waived these rights.[53]

This point is clear from this Court's holding in *Butler*. In determining that a waiver may be implied from the suspect's acknowledgement of his rights and a "course of conduct" that indicates waiver, it is clear that the police may ask questions in the absence of an express waiver.[54] This is because in some cases "waiver can be

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[51] *Miranda*, 384 U.S. at 473-474 (emphasis added; footnote omitted).
[52] A *plurality* of this Court, however, indicated in obiter dictum that *Miranda* required the obtaining of a waiver before beginning questioning in *Missouri v. Seibert*, 542 U.S. 600, 608 (2004) (Souter, J., plurality opinion)(stating the "failure to give the prescribed warnings and obtain a waiver of rights *before* custodial questioning generally requires exclusion of any statements obtained.").
[53] *Elstad*, 470 U.S. at 308-309; *See also Seibert*, 542 U.S. at 619-620 (Kennedy, J., concurring).
[54] *Butler*, 441 U.S. at 373.

clearly inferred from the actions and words of the person interrogated."[55] There was no indication that the police acted improperly in *Butler* by moving forward with the interrogation of the suspect in the absence of an express waiver of his right to an attorney. In fact, this Court suggested that the police acted properly:

> There is no doubt that this respondent was adequately and effectively apprised of his rights. The only question is whether he waived the exercise of one of those rights, the right to the presence of a lawyer. Neither the state court nor the respondent has offered any reason why there must be a negative answer to that question in the absence of an *express* waiver.[56]

Thus, the police may continue an interview with a suspect, once a suspect is warned of all his rights and he acknowledges them but the suspect does not expressly waive his rights. A rule that police are barred from asking a suspect questions absent an express waiver is irreconcilable with the holding in *Butler*.

The decision in *Miranda* was intended to provide "concrete constitutional guidelines" to follow.[57] As evidenced by the decision of the lower courts, it is common for law enforcement officers to inform a suspect of his rights and, once the suspect acknowledged those rights, continue the interview and begin questioning even where there was no express waiver of those rights. That is what occurred in *Butler* with respect to the suspect's right to counsel – he was questioned even

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[55] *Butler*, 441 U.S. at 373.

[56] *Butler*, 441 U.S. at 374 (emphasis in original).

[57] *Miranda*, 384 U.S. at 441-442.

though he had said nothing about waiving that right. The same is true here with regard to his right to remain silent. There was nothing improper with the police conduct.

B. Thompkins did not invoke his right to remain silent.

The Michigan courts here rejected the claim advanced by Thompkins that his conduct constituted invocation of his right to remain silent by his conduct. Pet. App. 75a; J.A. 28a. There is no clearly established precedent from this Court that requires a different result.

In determining that the Michigan courts were objectively unreasonable in concluding that Thompkins had waived his right to remain silent and his right to counsel, the Sixth Circuit did not reach the issue about whether Thompkins may have invoked his right to remain silent by his post-warning conduct. Pet. App. 29a. There was no such invocation. Even if interpreted as an equivocal assertion, there was no obligation for the police to cease questioning.

The question whether an in-custody suspect has waived his rights under *Miranda* is distinct from the inquiry whether he has invoked this right.[58] Under *Miranda*, once the in-custody suspect requests to remain silent or requests counsel, the police must honor this request either by ceasing questioning or by providing counsel.[59]

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[58] *Smith v. Illinois*, 469 U.S. 91, 98 (1984).

[59] *Miranda*, 384 U.S. at 473-474.

The issue arises about what must occur if the request to remain silent or for counsel is equivocal. This Court has not previously answered this question for the right to remain silent. Regarding the right to counsel, this Court stated in *Davis v. United States* that the "suspect must unambiguously request counsel" or otherwise there is no obligation to cease questioning.[60] *Davis* specifically rejected the idea that the police must obtain clarification before continuing with an interrogation:

> But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect might want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.[61]

This Court has not previously addressed whether this standard would apply for an equivocal assertion of a suspect's right to remain silent. Many circuits, though, have ruled that the analysis in *Davis* would apply to both the right to an attorney and the right to remain silent.[62] This Court should expressly adopt the *Davis* standard here insofar as Thompkins claims that he invoked his right to remain silent through his conduct. At the very least, the fact that the lower courts have applied *Davis* to the right to remain silent confirms the lack of clearly established precedent from this Court on this point.

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[60] *Davis*, 512 U.S. at 459.

[61] *Davis*, 512 U.S. at 462.

[62] *See Bui v. DiPaolo*, 170 F.3d 232, 239 (1st Cir. 1999)("[E]very circuit that has addressed the issue squarely has concluded that *Davis* applies to both components of *Miranda*: the right to counsel and the right to remain silent.").

As already noted, Thompkins acknowledged his rights under *Miranda* after having read out loud that he had the right to decide to remain silent and a right to talk with a lawyer at any time. J.A. 8-11a, 146a. Although he remained "largely silent," Thompkins did sporadically answer with verbal and non-verbal responses. J.A. 9a-10a, 17a-24a. Thompkins neither requested an attorney, nor did say that he wished the interview to end. J.A. 19a-22a. Near the end of the interview, he voluntarily answered the questions that he believed in God and that he prayed for forgiveness for shooting the boy. There was no request that he remain silent or for the interview to end. The police had no obligation to cease questioning.

This conclusion is consistent with the concurring opinion by Justice Kennedy in which he stated that "[w]here a required *Miranda* warning has been given, a suspect's later confession, made outside counsel's presence, is suppressed to protect the Fifth Amendment right of silence *only* if a reasonable officer should have been certain that the suspect expressed the unequivocal election of the right."[63] The police conduct was proper. The Michigan courts were not unreasonable in ruling that Thompkins had not invoked his right to remain silent.

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[63] *Texas v. Cobb*, 532 U.S. 162, 176 (2001)(Kennedy, J., concurring) (emphasis added).

II. The Michigan Court of Appeals did not act unreasonably in rejecting Thompkins's ineffective assistance of counsel claim under *Strickland v. Washington*.

The Michigan Courts did not unreasonably apply this Court's precedent in denying Thompkins's ineffective assistance of counsel claim. Thompkins contends that he was prejudiced by his counsel's failure to ask for a jury instruction prohibiting the jury from considering Purifoy's acquittal for anything other than his credibility. The Sixth Circuit agreed and reasoned that the evidence Purifoy was acquitted likely exerted a "powerful influence" on the jury to convict Thompkins to ensure that someone would be held accountable for the crime in light of the fact that Purifoy was not. Pet. App. 35a. The Sixth Circuit also reasoned that the jury might have drawn an inference that because either Purifoy or Thompkins was the shooter and Purifoy was acquitted, that therefore Thompkins must be guilty. Pet. App. 35a. But Thompkins's jury knew that Purifoy was tried under an aiding-and-abetting theory – not is the shooter – and so there is no reasonable danger that it determined his guilt by process of elimination.

Moreover, the jury was correctly instructed that it had the sole responsibility to determine the facts, and it must acquit Thompkins unless it was convinced of his guilt beyond a reasonable doubt. Consistent with the standard established by this Court in *Strickland v. Washington*,[64] the Michigan Court of Appeals found that Thompkins had not demonstrated prejudice because "the record does not disclose an attempt to argue [Purifoy's] conviction for an improper purpose." Pet. App. 80a. The decision is not unreasonable because it must be

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[64] *Strickland v. Washington*, 466 U.S. 668 (1984).

presumed that the jury followed its instructions and did not make illogical inferences, and because the strong evidence of Thompkins's guilt was not undercut by evidence that Purifoy had been acquitted. The Sixth Circuit erred in granting habeas relief on this claim.

A. The State court decision finding no *Strickland* prejudice is entitled to substantial deference under 28 U.S.C. § 2254(d).

Section 2254(d) of AEDPA affords the State court adjudication of constitutional claims considerable deference. The Court interpreted the unreasonable application prong of § 2254(d)(1) in *Williams* as requiring habeas courts to defer to State court applications of federal law that are not objectively unreasonable.[65] In *Rompilla v. Beard*, this Court stated that an "unreasonable application" occurs when a State court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of petitioner's case."[66]

This Court has consistently drawn a distinction between State court decisions applying a broad constitutional standard and ones that apply a narrow rule. Where a standard is at issue, State court decisions are given greater leeway:

> Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity.

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[65] *Williams*, 529 U.S. at 412.

[66] *Rompilla v. Beard*, 545 U.S. 374, 380 (2005), quoting *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (internal quotes omitted).

> The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.[67]

In *Knowles v. Mirzayance*, the Court held that ineffective assistance of counsel claims must be given extra latitude in light of the general nature of the rule: "because the *Strickland* standard is a general standard, a State court has even more latitude to reasonably determine that a defendant has not satisfied that standard."[68]

The Michigan court was entitled to substantial leeway in resolving the question whether Thompkins was prejudiced by his counsel's failure to seek the special jury instruction.

B. The *Strickland* standard requires a reviewing court to assume that the jury reasonably, conscientiously, and impartially applied the jury instructions in determining whether counsel's actions prejudiced the defense.

A claim of ineffective assistance of counsel is governed by *Strickland v. Washington*.[69] To establish ineffective assistance, a defendant must demonstrate that counsel's performance was objectively unreasonable and that he was prejudiced by counsel's action or inaction.[70]

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[67] *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).
[68] *Knowles v. Mirzayance*, 556 U.S. ___; 129 S. Ct. 1411, 1420 (2009).
[69] *Strickland*, 466 U.S. at 668.
[70] *Strickland*, 466 U.S. at 687- 688; *Williams*, 529 U.S. at 412

The defendant bears the burden of affirmatively proving prejudice.[71] It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.[72] The defendant must show that there is a reasonable probability that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[73]

But the "reasonable probability" standard requires a reviewing court to make certain assumptions and disregard forms of speculative prejudice. A defendant has no entitlement to the benefit of a lawless decision-maker.[74] A reviewing court must also assume that the jury "reasonably, conscientiously, and impartially" applied the standards for which it was instructed.[75] The reviewing court "must exclude the possibility of arbitrariness, whimsy, caprice, [and] nullification."[76] That is, the possibility that a jury might disregard its oath and instructions is not the sort of prejudice protected by the right to the effective assistance of counsel.

C. The State court decision in this case applied the correct standard.

The Michigan court applied the correct test. In deciding Thompkins's claim, the state trial court stated that it must determine whether counsel's performance fell below an objective standard of reasonableness, and if so, whether but for the errors there is a reasonable

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[71] *Strickland*, 466 U.S. at 693.
[72] *Strickland*, 466 U.S. at 693.
[73] *Strickland*, 466 U.S. at 694.
[74] *Strickland*, 466 U.S. at 695.
[75] *Strickland*, 466 U.S. at 694-695.
[76] *Strickland*, 466 U.S. at 694-695.

probability that the result of the proceeding would have been different. J.A. 233a-235a (Opinion and Order Denying Motion for New Trial).

The Michigan Court of Appeals stated that Thompkins was required to show that "counsel made errors so serious that he was not functioning as the 'counsel' guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial." Pet. App. 79a. The State court cited the Michigan Supreme Court's decision in *People v. Mitchell*, as authority for the standard.[77] And *Mitchell*, in turn, cites to *People v. Pickens*,[78] where the Michigan Supreme Court held that the Michigan Constitution did not justify a more restrictive standard than the United States Constitution and adopted the *Strickland* test. The *Mitchell* decision quotes directly from *Strickland:*

> [T]he deficient performance [must have] prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. [*Strickland* at 687.][79]

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[77] *People v. Mitchell*, 454 Mich. 145; 560 N.W.2d 600, 606 (1997); habeas relief subsequently granted in *Mitchell v. Mason*, 257 F.3d 554 (6th Cir. 2001) and reaffirmed in *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003).

[78] *People v. Pickens*, 446 Mich. 298; 521 N.W.2d 797 (1994).

[79] *Mitchell*, 560 N.W.2d at 606.

While the reference to a "fair trial" without explicit reference to the "reasonable probability" standard is similar to the problem this Court faced in *Williams v. Taylor*, this case is distinguishable.[80] In *Williams*, the Virginia Supreme Court had explicitly eschewed the "reasonable probability" standard. To the contrary, the *Mitchell* decision – relied on by the Michigan court in the present case – correctly observed that the "test requires the greatest level of factual inquiry into the actual conduct of the defense *and its effect on the outcome of the trial*," and then it quoted directly from *Strickland*.[81]

D. The State court application of the *Strickland* prejudice standard was not objectively unreasonable.

The Michigan Court of Appeals reasonably concluded that Thompkins was not prejudiced by his counsel's failure to request the special instruction for two reasons.

First, *Strickland* does not allow for the possibility of a lawless decision-maker.[82] And Thompkins's claim of prejudice relies on the possibility that the jury disregarded logic, its oath, and its instructions and convicted Thompkins so that *someone* was made to pay for the crime. The *Strickland* standard excludes such hypothetical forms of prejudice.

Second, the strong, mutually corroborating, evidence of Thompkins's guilt was not affected by counsel's alleged error. There was no reasonable

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[80] *Williams*, 529 U.S. at 393-394.

[81] *Mitchell*, 560 N.W.2d at 606 (emphasis added).

[82] *Strickland*, 466 U.S. at 695.

probability that the result of the trial would have been different had the special instruction been requested.

1. The alleged prejudice is based on the unwarranted assumption that the jury might have disregarded logic, its oath, its instructions, and the parties' arguments.

Thompkins cannot demonstrate that he was prejudiced by the failure of his counsel to request a limiting instruction on the permissible use of Purifoy's acquittal because no prejudice occurred. Thompkins's jury was aware that Purifoy had been tried under an aiding-and-abetting theory. France testified at Thompkins's trial that he asserted during Purifoy's trial that Thompkins was the shooter and Purifoy was the driver. J.A. 99a. Purifoy and Helgert also testified that Purifoy had been tried under an abetting-and-abetting theory. J.A. 139a-141a, 177a. No logical inference can be drawn from Purifoy's acquittal as an aider and abettor to Thompkins's guilt. The jury could only have based its guilty verdict on Purifoy's acquittal if it had reasoned that either Thompkins or Purifoy must have been the shooter, and if the other jury found that Purifoy was not the shooter, then Thompkins must be. But once the jury was informed from the testimony of France, Purifoy, and Helgert that Purifoy was charged only with being an aider and abettor based on the same theory that was being presented to Thompkins's jury, that inference was not logically available. Purifoy's acquittal as an aider and abettor says nothing about Thompkins's guilt as the shooter. In other words, because the Purifoy jury was never asked to find that Purifoy was the shooter, his acquittal does not contradict the claim that he was the shooter.

This inference of guilt by process of elimination was also prevented by the jury instructions. The jury was properly instructed multiple times regarding its exclusive role as the fact-finder. These instructions prevented it from giving any weight to the other jury's determination about Purifoy's culpability. The jury was also instructed that the prosecutor carried the burden of proving Thompkins's guilt beyond a reasonable doubt, and that it must acquit Thompkins if the burden of proof was not met. This instruction prevented it from finding Thompkins guilty merely so *someone* would be held accountable for the crime. The instruction regarding the burden of proof prevents a jury from convicting a defendant out of blind vengeance.

Strickland instructs that in determining whether counsel's actions prejudiced a criminal defendant, a reviewing court must assume that the jury reasonably, conscientiously, and impartially applied the standards for which it was instructed. The reviewing court must exclude the possibility of arbitrariness, whimsy, caprice, and nullification on the part of the jury.[83] The Sixth Circuit ignored this limiting principle, basing its finding of prejudice on its speculation that the jury might have disregarded its jury instructions and held Thompkins responsible for the crime because Purifoy had not been:

> [T]hat Purifoy had been acquitted of murder likely exerted a powerful influence on the jury to convict Thompkins of murder. If the jury did not convict Thompkins, the jury knew that no one would be convicted of killing Morris and shooting France. Most importantly, in the absence of a limiting instruction, the jury

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[83] *Strickland*, 466 U.S. at 694-695.

> could well have believed that it was entirely proper to weigh Purifoy's acquittal as significant evidence that Thompkins must have been the shooter. [Pet. App. 35a.]

This line of speculation evinces a fundamental misapplication of the facet of the *Strickland* prejudice prong that excludes speculative forms of prejudice. The Sixth Circuit gave weight to the possibility that the jury ignored multiple instructions that it was the sole trier of fact and that the prosecutor had the burden to prove Thompkins guilty with evidence to convince it beyond a reasonable doubt. The Sixth Circuit instead assumed that the jury likely held Thompkins responsible solely because if it acquitted him no one would be made to pay for the murder. But a defendant has no entitlement to the benefit of a lawless decision-maker.[84] If it is fair to entertain the possibility that the jury ignored its instructions regarding its exclusive role as fact-finder and the prosecutor's burden of proof, then a special instruction would have provided no additional protection. If the general instructions were ignored, then there is no reason to believe that a special instruction would have been heeded either. The jury was duty-bound to follow all of its instructions. This speculative form of potential prejudice caused by the evidence of Purifoy's acquittal cannot and would not have been avoided with yet another jury instruction.

Nor did either party suggest the worrisome and illogical inference that Purifoy's acquittal pointed to Thompkins's guilt as the principal. Rather, Purifoy's prior trial and acquittal was only used as a means of assessing his credibility as a witness, the source of his

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[84] *Strickland*, 466 U.S. at 695.

knowledge about the facts of the case, and to put into context the written correspondence Purifoy sent to Thompkins after Purifoy's trial. The prosecutor suggested that if Thompkins truly was the driver, he would have said so in his return letters to Purifoy where Purifoy confirmed that Purifoy was the driver. Defense counsel used the correspondences to attack Purifoy's credibility and suggest that he was attempting to place the blame first on Thompkins and then on Woodward. The prosecutor *never* used the result of Purifoy's trial to draw an inference that if Purifoy was found not guilty then Thompkins must have been the shooter.

Even if Purifoy's acquittal of murder could have been considered as substantive evidence by Thompkins's jury, it does not make it more likely or not that Thompkins was the shooter. It does not speak to the issue. If anything, the opposite inference could have been drawn: if the prosecutor asserted consistently in both trials that Purifoy was the driver and Thompkins was the shooter, then Thompkins's jury could infer his innocence from Purifoy's jury's decision to acquit after the same theory was put forward to them. In any event, the prosecutor specifically discouraged the drawing of any such improper inference by informing the jury that they were not bound by what Purifoy's jury did.

The Sixth Circuit was also troubled by the jury instruction that allowed the jury to convict solely based on the testimony of an accomplice. The Sixth Circuit reasoned that when this instruction is added to Purifoy's testimony that he was acquitted, it yields the reasonable probability that Thompkins was convicted based only on Purifoy's acquittal. But the instruction was read out of context. The instructions did not allow for the inference of Thompkins's guilt from Purifoy's acquittal because it instructed the jury only that: "You may convict the

defendant based only on the accomplice's testimony, if you believe the testimony *and it proves the defendant's guilt beyond a reasonable doubt."* J.A. 214a (emphasis added). The fact of Purifoy's acquittal as an aider and abettor does not allow for a logical inference of Thompkins's guilt at all, let alone allow for such an inference beyond a reasonable doubt.

Lastly, while the State of Michigan is aware that *Lockhart v. Fretwell* did not supplant the *Strickland* prejudice standard, it informs the analysis in this case. In *Fretwell*, a death penalty case, counsel failed to assert a defense to an aggravating factor that was based on an incorrect understanding of the law. This Court held that a "counsel's failure to make an objection in a State criminal sentencing proceeding – an objection that would have been supported by a decision which subsequently was overruled – [does not] constitute[] 'prejudice' within the meaning" of *Strickland*.[85] This Court concluded that to "hold otherwise would grant criminal defendants a windfall to which they are not entitled."[86] If a criminal defendant cannot point to the failure of his counsel to gain a *benefit* from a lawless decision-maker to establish prejudice, so too he cannot point to the failure of his counsel to *prevent* the possibility of harm from a lawlessness decision-maker. A prejudice standard that must account for such speculation is no standard at all because "virtually every act or omission of counsel would meet that test."[87]

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[85] *Lockhart v. Fretwell*, 506 U.S. 364, 366 (1992).
[86] *Fretwell*, 506 U.S. at 366.
[87] *Strickland*, 466 U.S. at 693.

2. Counsel's alleged error had no impact on the strong evidence of Thompkins's guilt.

Strickland also instructs that the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt, and to answer this question the Court must consider the totality of the evidence before the jury.[88] *Strickland* recognizes that some factual findings will have been unaffected by the errors and will have had an isolated, trivial effect. The unaffected findings must be taken as a given.[89]

The evidence strongly indicating Thompkins's guilt would not have been affected by the addition of the special jury instruction. The most damaging evidence was the surviving victim's positive identification of Thompkins as the shooter. J.A. 77a-83a, 88a-89a, 103a-107a. The surviving victim's eyewitness identification testimony in this case was supported by the photograph taken from the delicatessen's surveillance video. This photograph indisputably depicted Thompkins and Purifoy as the men involved in the altercation. J.A. 107a, 112a-113a, 138, 200a-201a. Therefore, the only question was whether France correctly identified Thompkins as the shooter and Purifoy as the driver. But the jury saw for themselves how dissimilar the two men appeared. J.A. 81a-82a. And France had a good eye-to-eye contact with Thompkins and was certain of his identification. J.A. 88a-89a. The special jury instruction would have had no impact whatsoever on this lynch-pin evidence. Whether the jury felt bound by Purifoy's jury's determination that he was not guilty as an aider and

---

[88] *Strickland*, 466 U.S. at 695.

[89] *Strickland*, 466 U.S. at 695-696.

abettor has no relevance to the jury's determination whether France correctly picked Thompkins as the shooter and Purifoy as the driver.

Additionally, Thompkins's abandoned van was identified as the van involved in the shooting. J.A. 137a, 142a-144a. It had distinctive gold rims that he removed before he abandoned it. He confessed that he was the shooter to Stephens. J.A. 113a-115a. Stephens account of the confession included Thompkins's statement that he stripped and abandoned his van after the crime, a detail that was therefore corroborated. J.A. 115a-117a. Of course, Thompkins also admitted to the police that he prayed for the boy he shot down. J.A. 153a. And finally, his flight from Michigan, change of identities, and refusal to admit his true identify ever to the Ohio authorities, point to his culpability. J.A. 121a-132a. None of these items are undermined by the failure to give the special jury instruction. Because the weight of the prosecutor's case was unaffected by the alleged deficient performance of defense counsel, there is no reasonable probability that the jury would have had a reasonable doubt regarding guilt had the instruction been given.

The Michigan Court was owed substantial deference to its conclusion that Thompkins was not prejudiced by his counsel's failure to seek an instruction that specifically limited the jury's use of Purifoy's acquittal. And given the facts that (1) the only conceivable prejudice is one that entertains the possibility of a lawless jury; (2) the feared inference would have been an illogical one to draw; and (3) the alleged error had no impact on the evidence that proved Thompkins's guilt, the State court's decision cannot be characterized as objectively unreasonable, and habeas relief should have been denied.

CONCLUSION

For these reasons, the State of Michigan asks this Court to reverse the decision of the Sixth Circuit.

Respectfully submitted,

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Dated: December 2009

ATTACHMENT

NOTIFICATION OF CONSTITUTIONAL RIGHTS AND STATEMENT

1. YOU HAVE THE RIGHT TO REMAIN SILENT.
2. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.
3. YOU HAVE A RIGHT TO TALK TO A LAWYER BEFORE ANSWERING ANY QUESTIONS AND YOU HAVE THE RIGHT TO HAVE A LAWYER PRESENT WITH YOU WHILE YOU ARE ANSWERING ANY QUESTIONS.
4. IF YOU CANNOT AFFORD TO HIRE A LAWYER, ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING, IF YOU WISH ONE.
5. YOU HAVE THE RIGHT TO DECIDE AT ANY TIME BEFORE OR DURING QUESTIONING TO USE YOUR RIGHT TO REMAIN SILENT AND YOUR RIGHT TO TALK WITH A LAWYER WHILE YOU ARE BEING QUESTIONED.

DO YOU UNDERSTAND EACH OF THESE RIGHTS THAT I HAVE EXPLAINED TO YOU? _____

SIGNATURE _____ DATE/TIME _____

Δ read 5 aloud; 1-5 read by Off to Δ. Δ asked to initial 1-5, refused 1s/ "all'm not going to sign anything."

This shortened. See narrative report

00-1489 M. Δ Jon Thompkins

OFFICER/WITNESS Christopher David Dawley
2/20/01 1833

ORIGINAL IN RED

RESPONDENT'S BRIEF

FOR ARGUMENT

Supreme Court, U.S.
FILED
JAN 19 2010
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No. 08-1470

B697

In The

Supreme Court of the United States

MARY BERGHUIS, Warden,

Petitioner,

v.

VAN CHESTER THOMPKINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

I. Whether the Sixth Circuit expanded the *Miranda v Arizona* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them and then he remained silent for almost three hours.

II. Whether the Sixth Circuit Court of Appeals failed to afford the State court the deference it was entitled to under 28 U.S.C. 2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of defendant's guilt allowed the State to reasonably reject the claim.

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STATEMENT OF FACTS

On January 10, 2000, at about 9:00 p.m. a shooting occurred in a strip mall parking lot on Greenfield Road in the city of Southfield, Michigan. Samuel Morris died from multiple gunshot wounds. His friend, Frederick France, although shot several times, survived. Three men were identified as being wanted for questioning. These three were Eric Purifoy, Myzell Woodward and the Respondent. Myzell Woodward contacted the police shortly after the incident, gave a statement, and was never charged. Eric Purifoy, after a phone call from the police, turned himself in. He was charged with the same crimes with which Respondent would be charged. He was tried in August of 2000, and was acquitted of murder and assault charges and convicted of carrying a concealed weapon. The jury hung on two other gun charges to which he pled guilty at a later date.

A year after the incident on February 19, 2001, Respondent was arrested on a tip near Columbus, Ohio. Two days later Detective Helgert of the Southfield Police Department and his partner interrogated the Respondent at the county jail in Columbus, Ohio. A statement was obtained and he was returned to Michigan to stand trial. J.A. 4a-28a.

At a hearing on the admissibility of the statement, Detective Helgert testified that both he and Detective Dowling engaged in the interrogation. J.A. 21a. Respondent was advised of his *Miranda*

rights but refused to sign the acknowledgment form. He rarely made eye contact with the officers. J.A. 11a. The interrogation lasted upwards of three hours in which the only verbal statement concerning Respondent's involvement occurred near the end of the interview. J.A. 8a, 10a.

At that point, almost three hours into the interrogation, with no statement obtained, Detective Helgert decided to take a spiritual tack by asking Respondent if he believed in God and if he prayed to God to forgive him for shooting that boy down. The Respondent, through tears, answered "Yes" to both questions. He refused to write this down. J.A. 11a. These two "Yes" answers were offered in evidence against him. The questions were asked after Respondent consistently exercised his right to remain silent for at least two hours and 45 minutes. J.A. 20a.

The officer characterized the interrogation as "very, very one-sided" J.A. 10a, "nearly a monologue" J.A. 17a, and described the Respondent as "largely silent" J.A. 19a and "uncommunicative" J.A. 10a and "not verbally communicative" J.A. 17a.

When questioned about the exercise of his rights, the following colloquy was had:

> Q. But consistently . . . every time you gave him an opportunity to participate meaningfully in the conversation he exercised his right to remain silent.

A. Largely, he remained silent, that's correct.

J.A. 18a-19a.

The trial court denied the motion to suppress finding that the defendant never invoked his right to remain silent. It found that the defendant participated in the interview by making eye contact, nodding, and answering questions, "I don't know." J.A. 28a.

TRIAL

On May 13, 2002, trial began. The defense theory was that Eric Purifoy was the shooter and that Respondent was merely present.

In the prosecution's case-in-chief, Frederick France testified that he and Samuel Morris were driving a red car into the parking lot of a strip mall when several men exited Lou's Deli and walked in front of their car. One of the men stared into the red car. That man was identified as the Respondent. France observed some of the men get into a white van. The van pulled up parallel with the red car. The passenger in the van shot into the driver's plastic-covered window of the red car. Mr. France exited from the passenger's side and ran to a drug store. He was hit by several bullets. J.A. 74a-76a. Returning to the scene, he found his friend lying on the ground by the passenger door.

France testified that the day after the shooting, a detective showed him a still photo off of a videotape from Lou's Deli. France pointed to Respondent in the photo and said he was the shooter. He admitted that when subsequently shown a photo array that included a photo of the Respondent, he selected another person. J.A. 98a. France also identified Eric Purifoy from the still photo and described him as the driver. J.A. 79a.

The following colloquy was then had concerning Purifoy:

> Q. Do you know if he was charged?
>
> A. Yeah, he got charged, but he got found not guilty on having anything to do with this.
>
> Q. The murder?
>
> A. Yes.

J.A. 82a-83a.

> On redirect, the following occurred:
>
> Q. When you testified at Eric Purifoy's trial who did you testify shot you?
>
> A. Van Thompkins.
>
> Q. When you testified at Eric Purifoy's trial who did you testify was the driver of the car that drove Van Thompkins to shoot you?
>
> A. Eric Purifoy.

J.A. 99a.

Upon his arrest, Respondent offered an alias. Officer James Parrish believed the person in custody was Van Chester Thompkins and so he called out "Van." The Respondent replied, "What?". After that the Respondent stopped talking. J.A. 130a.

Detective Helgert testified that Eric Purifoy had been charged as an aider and abettor with the same seven counts as Respondent. He was acquitted of the murder and assault with intent to commit murder charges and was found guilty of carrying a concealed weapon in the motor vehicle. The jury hung as to two other gun charges. Subsequently, he pled guilty to those two charges. J.A. 139a-141a.

In regard to the interrogation, Detective Helgert testified that it took place in an austere, 8 x 10 foot room at a detention facility. The Respondent sat in a school-room type chair. J.A. 144a-145a. The Detective used an Acknowledgment of Rights form to advise Thompkins of his *Miranda* rights. J.A. 147a. The form is reproduced in Petitioner's Brief p 60. The officer did not recall asking the Respondent if he understood his rights, but the Respondent never stated that he did not understand them. He did not agree to initial or sign the form. J.A. 147a-148a.

The Detective described Mr. Thompkins as "[p]eculiar. Sullen. Generally quiet." The Respondent would not look at him and Helgert had to tell him to look at him and to pay attention. J.A. 149a. He simply held his head down. J.A. 152a. When asked how Thompkins responded to the attempts to get him

to talk, the Detective stated that "not only did it not illicit (sic) any admissions or denials, for that matter, it didn't really illicit (sic) any sort of reaction." J.A. 152a. After some prodding as to what else the Respondent may have communicated, the Detective remembered that he declined the offer of a mint, and unbidden, stated that the chair was hard. J.A. 152a.

Helgert used several themes to persuade Respondent to talk with him such as there are two sides to a story, but he didn't "provide any reasonable, any significant response." J.A. 149a. He also told him, "People are going to want to hear from you" and also gave him disinformation. J.A. 150a. The Detective described his efforts during the interrogation as "repetitive." J.A. 153a.

At the end of the interview, Helgert then asked him if he believed in God and if he prayed to God to forgive him for shooting that boy down. Thompkins through tears answered "yes" to both questions. J.A. 153a.

The jury returned verdicts of guilty of premeditated first degree murder; possession of a firearm during the commission of a felony; assault with intent to murder; possession of a firearm during the commission of a felony; felon in possession of a firearm; possession of a firearm during the commission of a felony; and carrying a concealed weapon in a motor vehicle. The Respondent was sentenced to life in prison without parole on the

murder charge, among other sentences imposed for the other offenses.

STATE POST CONVICTION PROCEEDINGS

In a motion for new trial, Respondent challenged the admissibility of the statement and the constitutionality of the identification procedures. He also raised several issues in regard to prosecutorial misconduct and ineffective assistance of counsel. He asked for a hearing on the latter issue.

The trial court denied the request for a hearing and denied the motion for new trial. However, it found that trial counsel's performance was deficient in three ways. First, counsel failed to request a limiting instruction both immediately after the accomplice testimony and also an instruction to be given during the charge to the jury concerning the accomplice's acquittals on the murder and assault charges, his conviction by jury of a gun count, and his guilty pleas to gun charges upon which the jury had hung; failed to ask for an instruction on the use of evidence of prior convictions, failed to ask for a limiting instruction concerning defendant's conviction for a prior felony that was a predicate offense to the felon in possession charge. J.A. 236a.

Second, counsel was deficient when he entered into stipulations that were unfairly prejudicial. J.A. 236a. One stipulation concerned a discovery violation which blamed the violation on the defendant but had

no relevance to the issue of guilt or innocence. The second stipulation concerned the felon in possession charge. As worded it allowed the jurors to speculate that the defendant had more than one prior felony and thus implied that he was incorrigible.

Third, counsel failed to object to prosecutorial misconduct. This was held to be error. J.A. 236a. The prosecutor offered evidence of the co-defendant's jury verdict and guilty plea convictions; denigrated counsel by implying that he was a liar; elicited evidence that the Detective believed Defendant was at the scene and that Purifoy was charged as an aider and abettor; and elicited evidence that the Respondent may have committed other crimes during that time he was absent from the jurisdiction. The trial court found error on the issue of prosecutorial misconduct, but found that the errors did not affect the outcome of the trial. J.A. 235a-236a.

On the prejudice prong of the test for ineffective assistance of counsel, the trial court concluded that but for these errors the outcome of the trial would not have been different. J.A. 236a-237a.

On appeal to the Michigan Court of Appeals, Respondent asked the Court to remand the matter to the trial court for a *Strickland* hearing. That motion was denied. On February 3, 2004, the Court of Appeals in a per curiam opinion affirmed Respondent's convictions. J.A. 84a. In regard to the *Miranda* issue, the Court found that the trial court did not clearly err in concluding that the defendant

voluntarily waived his right to remain silent and that he did not subsequently invoke his right to silence. It relied on *People v McReavy*, 436 Mich. 197; 462 N.W.2d 1 (1990). Res. App. 53a-54a.

In regard to the failure of counsel to request a limiting instruction, the Court found no error because the prosecution did not argue that the guilty plea convictions should be used for an improper purpose. Res. App. 56a. The court cited to *People v Mitchell*, 454 Mich. 145, 156; 560 N.W.2d 600 (1997) for the test for ineffective assistance of counsel quoting from it that defendant must show that "the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial." Res. App. 55a.

Respondent timely requested leave to appeal in the Michigan Supreme Court. On July 29, 2004, in case # 125667, the Court denied leave to appeal stating that it was not persuaded that the questions presented should be reviewed by the Court. Res. App. 52a.

PROCEEDINGS PURSUANT TO 28 U.S.C. 2254

On January 19, 2005, Respondent filed a petition for a writ of habeas corpus in the Eastern District of Michigan which included a request for a *Strickland* hearing. Thompkins raised four issues in the habeas application. Res. App. 20a-21a. The district court found that Thompkins had failed to "clearly and unequivocally" invoke his right to remain silent and

found that head-nodding constituted participation in the conversation. It also referred to "yeah," "no," and "I don't know" responses. Res. App. 47a-49a. The district court found that an effective attorney would have requested these instructions, but it concluded that the failure to request them did not render the trial fundamentally unfair. Res. App. 42a. The court only discussed the effect that evidence of Purifoy's convictions had on the case, but not the effect of Purifoy's acquittals.

A certificate of appealability was granted on three issues. These three issues were the challenge to statements under *Miranda v Arizona*, trial counsel's failure to request certain jury instructions, and prosecutorial misconduct stemming from the use of the accomplice's jury verdicts and guilty plea.

The Sixth Circuit denied relief based on the latter issue, but it reversed the judgment of the district court on the *Miranda* issue and on the ineffective assistance of counsel claim. Res. App. 16a. On the *Miranda* issue, the Circuit Court acknowledged that its ultimate review of the State court's decision was controlled by the standards set forth at 28 U.S.C. 2254(d) and that subsidiary findings of fact were entitled to a presumption of correctness under 28 U.S.C. 2254(e). Preliminarily, it reviewed the district court's determination regarding the constitutionality of a *Miranda* waiver de novo and the district court's underlying factual findings for clear error. On the waiver of rights, it reviewed de novo the district court's factual findings for clear error and

whether the words actually invoked the right. Res. App. 9a. The Sixth Circuit found that the State court's decision that Respondent had waived his *Miranda* rights was based on an unreasonable determination of the facts in light of the evidence and involved an unreasonable application of clearly established federal law. Because of this finding, it did not reach the invocation issue. Res. App. 12a-13a.

The Circuit Court also found that the State court applied the prejudice prong of the *Strickland* analysis in an objectively unreasonable manner. Res. App. 16a.

A request for en banc review was denied. Res. App. 18a.

On May 26, 2009, the State of Michigan filed a Petition for Writ of Certiorari. This Court granted the writ on September 30, 2009.

SUMMARY OF ARGUMENT

The Sixth Circuit Court of Appeals properly vacated the district court's denial of the writ on two grounds.

I. On the first ground, it found that the State court's decision that Respondent had waived his *Miranda* rights was based on an unreasonable determination of the facts in light of the evidence and involved an unreasonable application of clearly established federal law. After being advised of his

rights, Respondent refused to sign an acknowledgment of rights form. He was never asked if he wanted to waive his rights, nor was he ever offered a waiver of rights form to sign. Despite persistent questioning, he remained silent for almost three hours. At that point, the officers asked the Respondent if he believed in God and if he felt bad for killing that boy. Respondent through tears answered "Yes" to both questions. Under *Miranda,* once the defendant began to exercise his right to remain silent, all questioning should have ceased.

It was the State's heavy burden to show a valid waiver of the *Miranda* rights. In *North Carolina v Butler*, this Court recognized a narrow exception to *Miranda*'s preference for explicit waivers. Where a suspect refuses to sign a waiver of rights form but confesses shortly thereafter, with no prompting from the police, an implied waiver of the right to remain silent will be found. The facts and circumstances of this case, however, do not fit into that narrow exception.

The State's argument that a valid waiver may be predicated on giving two answers after three hours of questioning must be rejected. It ignores the finding by the *Miranda* court that without a valid waiver, there can be no questioning.

The Sixth Circuit, having found no valid waiver, did not reach the issue of whether a suspect must invoke the rights. In *Davis v United States,* this Court held that in order to restore a waived right to

counsel, the suspect must unambiguously assert the right. The State's argument that the *Davis* unambiguous assertion requirement also be applied to the initial stage of the interrogation process and to the right to remain silent would require this Court to overturn most of the decision in *Miranda v Arizona* and its progeny leaving only the formulaic recitation of the rights intact.

The rule was based on whether an officer who having obtained a valid waiver and being in mid-interrogation should be required to stop based on an ambiguous request for counsel. Such a rule maintains a fair balance between a suspect's Fifth Amendment rights and law enforcement's need to investigate crimes. These concerns are not present where no valid waiver has been obtained because the police, who are not permitted to question a suspect absent a valid waiver, are not in mid-interrogation.

The State's suggestion that officers be permitted unlimited pre-waiver interrogation would also be a radical revision of the dictates of *Miranda*. It ignores the fact that without giving the suspect the opportunity to waive his rights, the compulsion inherent in the custodial interrogation setting is not dispelled. It would also result in badgering or overreaching which whether explicit or subtle, deliberate or unintentional, might otherwise wear down the accused and persuade him to incriminate himself. *Smith v Illinois*, 469 U.S. 91, 493 (1984).

II. On the second ground, the Sixth Circuit vacated the district court's denial of the writ because that court erred in finding that Respondent was not prejudiced by the failure of counsel to request certain jury instructions. These instructions would have explained to the jury that evidence of the accomplice's acquittals and convictions could not be used as substantive evidence of Respondent's guilt.

The Circuit Court acted properly in not giving complete deference to a decision in which the test for prejudice was not based on clearly established law as determined by the Supreme Court. The State court had applied the *Fretwell* fundamental fairness test for prejudice rather than the *Strickland* "reasonable probability of a different result" test. The Sixth Circuit also acted properly in not deferring to the State court's prejudice determination where it was based on an objectively unreasonable application of the law to the facts. The State court had failed to re-evaluate the totality of the evidence after finding a deficient performance. It based its prejudice finding on whether the prosecutor argued the evidence for an improper purpose, not on whether the outcome of the proceedings would have been different absent the error.

ARGUMENT

I.

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES SUPPRESSION OF RESPONDENT'S TWO "YES" ANSWERS OBTAINED IN THE ABSENCE OF A VALID WAIVER WHERE RESPONDENT HAD REFUSED TO SIGN AN ACKNOWLEDGMENT OF RIGHTS FORM AND WHERE HE REMAINED SILENT DURING ALMOST THREE HOURS OF INCOMMUNICADO INTERROGATION.

The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself[.]"

Under 28 U.S.C. 2254d, an application for a writ of habeas corpus shall not be granted unless the decision of the State court is based on an unreasonable application of, or is contrary to, clearly established federal law as determined by the Supreme Court of the United States, or the decision is based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. "Clearly established federal law as determined by the Supreme Court" means just that – law determined by the Court. *Williams v Taylor*, 529 U.S. 362 (2000).

In the absence of clearly established law as determined by the Supreme Court, the Sixth Circuit

correctly found that the Michigan Courts had acted unreasonably in rejecting Respondent's Fifth Amendment claim on two grounds. First, the Michigan Courts made an unreasonable determination of the facts in light of the evidence and, second, it then unreasonably applied clearly established Supreme Court law to the facts.

A. Clearly established federal law requires the cessation of interrogation after a suspect has indicated in any manner that he wants to remain silent.

In order to dispel the coercion inherent in custodial interrogation, a suspect must be advised that he has the right to remain silent, to consult with an attorney, to have an attorney present during questioning, and to have an attorney appointed if the suspect is indigent. In the absence of the advice of rights or a valid waiver of those rights any statement taken is inadmissible. *Miranda v Arizona,* 384 U.S. 436, 470-473 (1966). But warnings alone do not dispel the coercive atmosphere. The decision itself to remain silent must be scrupulously honored. Assertion of the right can be done "in any manner." *Id.* at 479. A statement taken after the person exercises his privilege cannot be other than the product of compulsion. *Id.* at 473-474.

Consequently, the continuation of questioning after an accused has indicated in any manner that he wants to exercise his right to remain silent operates

on the individual to overcome his free choice in giving a statement. It circumvents the warnings themselves. Subsequent persistent questioning will be viewed as an effort to wear down the suspect's resistance to force him to change his mind. *Michigan v Moseley*, 423 U.S. 96, 104, 105-106 (1975).

The phrase "in any manner" encompasses silence as an assertion of the right because the word "any" is not an adjective of limit. It demands a broad interpretation, albeit, one read in context. *United States v Gonzales*, 520 U.S. 1, 5 1997) (relying upon *Webster's Third New International Dictionary* 97 (1976). When read with the admonition to police officers that they must scrupulously honor the exercise of the right, and in the absence of any limiting language in *Miranda*, the phrase "in any manner" calls for the broadest of interpretations, one that includes silence.

At least two Circuits, beside the Sixth, and one State court have found that remaining silent is a sufficient assertion of the right. The Ninth Circuit, in *United States v Wallace*, 848 F.2d 1464 (9th Cir. 1988), held that just 10 minutes of silence invoked the right. The Second Circuit, in *United States v Ramirez*, 79 F.3d 298, 304-305 (2nd Cir. 1996), found that "remaining totally silent would invoke the right" and that "a defendant need not rely on talismanic phrases or any special combination of words to invoke his Fifth Amendment right to remain silent." See also *United States v Montana*, 958 F.2d 516, 518 (2nd Cir.

1992) where the defendant nodded that he understood his *Miranda* rights then remained silent in response to all pedigree questions. This was a sufficient invocation of the right to remain silent. In *State v Hodges*, 77 P.3d 375, 376 (Wash. 2003), the Court held that remaining silent can be an invocation when the circumstances evince a clear and unequivocal invocation of the right.

B. Clearly established federal law places a heavy burden on the prosecution to prove that the defendant waived his right to remain silent. There is no burden on the defendant tc show that he asserted his right.

The prosecution has the burden of establishing a voluntary, knowing, and intelligent waiver of the rights. *Tague v Louisiana*, 444 U.S. 469 (1980). This burden is a heavy one. *North Carolina v Butler*, 441 U.S. 369, 373 (1979). To be valid, it must be the product of a free and deliberate choice, not the product of deception. *Colorado v Spring*, 479 U.S. 564, 573 (1987).

Every reasonable presumption against waiver is indulged. *Miranda, supra* at 471. It "will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Id.* at 475. In fact, silence plus a lengthy incommunicado interrogation before a statement is taken is strong evidence that the accused did not waive his rights. *Id.*

1. An explicit waiver of *Miranda* rights is the rule while an implied waiver is the exception.

Miranda requires an affirmative waiver of rights before questioning begins. 384 U.S. at 470. A narrow exception to this rule was carved out by the Court in *North Carolina v Butler*. The exception permits implied waivers where even though a defendant refuses to waive the rights in writing, he immediately engages in conversation with the interrogating officer. The *Butler* defendant acknowledged his rights and refused to sign the waiver form. The officers told him they would still like to speak with him. He then stated, "I will talk to you but I'm not signing any form." A statement was taken shortly thereafter.

Only a narrow exception comports with the presumption that a defendant did not waive his rights and comports with its corollary that a presumption of waiver will not be supported by a silent record. Nor would a valid waiver be found simply from the fact that a confession was eventually obtained. *Miranda*, 384 U.S. at 475. A narrow exception is consistent with the idea that the custodial setting works very quickly to undermine the individual's will to resist and would compel him to speak when he would not otherwise do so. *Id.* at 467. An explicit waiver rule is a bright-line rule that is easy to apply. The *Butler* exception is also easy to apply as long as the immediacy requirement remains.

Without the immediacy requirement, courts cannot be assured that the confession is the product of the accused's unfettered will.

The facts in *Butler* contrast dramatically with those in the case at bar in three significant ways. First, the officers were not concerned with obtaining any waiver, express or implied. This is evident from reviewing the one form they brought with them to the detention facility. It was only an acknowledgment of the receipt of rights. Brief for Petitioner p 60. Despite the fact that there was plenty of blank space on the acknowledgment form, it did not also include a signature line below a phrase such as "I now give up my right to remain silent and will answer questions." The *Butler* officers were trying to comply with the dictates of *Miranda* by obtaining a valid waiver. No evidence points to this being a goal of the *Thompkins* officers. Mr. Butler's objection was only to signing a document, not to speaking with the officers. By contrast, Mr. Thompkins not only wouldn't sign anything, he was, in Detective Helgert's own words, uncommunicative.

Second, rather than ask a clarifying question after the defendant refused to sign the acknowledgment of rights form, the police made statements which undermined the right to remain silent. Detective Helgert recounted his discussion with Thompkins " . . . we had to advise him of his rights before we talked to him. And the purpose of us wanting to talk to him was to acquire his version of events, because the theme would have been, of

course, there is (sic) always sides to any of them." J.A. 13a-14a. The detective explained that " . . . we tried to persuade him to sign his Rights Form and make the initials and so on, and he wouldn't and then we did enter into an interview mode." J.A. 15a. He further told Thompkins, "This is your opportunity to talk. What do you think is going to happen? Who is going to speak up for you if you don't speak up for yourself?" J.A. 21a. At trial, the detective testified that he told him "You need to help yourself, you need to put forth an explanation. People are going to want to hear from you." J.A. 150a. These comments were not clarifying questions, but attempts to persuade the Respondent to forego his privilege against self-incrimination and right to counsel.

Third, the Respondent did not immediately give a statement as Mr. Butler did. In fact, it took the officers almost three hours to pry one out of him. And then it was only in response to a question designed to wear down whatever resistance remained. Mr. Butler was not badgered. Mr. Thompkins was.

All other cases cited by Petitioner fall into this narrow exception where a refusal to sign a waiver of rights form followed shortly thereafter by a confession is found to be an implied waiver. See *e.g. United States v Velasquez*, 626 F.2d 314, 320 (3rd Cir. 1980) (the accused immediately responded to questions with a view to minimizing her role in the offense); *United States v Washington*, 462 F.3d 1124, 1134 (6th Cir. 2006) (defendant signed a form agreeing to listen without counsel to the officers as they discussed

cooperation and upon being shown a photo of the robbery stated "anybody can see that's me in the picture."); *United States v Nichols*, 512 F.3d 789, 798 (6th Cir. 2008) (defendant's refusal to identify himself did not function as an invocation of the right to remain silent where a few minutes later during the booking procedure he confessed); *United States v Binion*, 570 F.3d 1034, 1041 (8th Cir. 2009) (the defendant verbally acknowledged his rights, refused to sign the waiver form and when asked if he had anything further to say responded "I'm booked, I'll be back in 10-15 [years]. Did you see what they took off of me?"). In this last case, the Eighth Circuit did not use an implied waiver analysis holding instead that the question was not designed to elicit an incriminating response. It cited to *Rhode Island v Innis*, 446 U.S. 291 (1980).

All of these cases fit within that narrow *Butler* exception. The suspects refused to sign the waiver of rights form and then they readily entered into a discussion with the police. The immediate and voluntary nature of the subsequent discussion became the basis for finding a valid waiver.

Both Petitioner and the United States as amicus curiae cite to *United States v Cardwell*, 433 F.3d 378, 389-390 (4th Cir. 2005), suggesting a similarity to the facts at bar because that defendant remained silent for an hour and a half before making admissions. But a closer examination of the facts reveal just how different the two cases are. After being advised of his rights, the defendant in *Cardwell* was placed in the

front seat of the scout car, hands cuffed in front, for an hours-long drive to the jail. About an hour and a half into the drive, the defendant began discussing farming and continued to talk for 20-30 minutes. The agent then asked why the defendant had not immediately come to the door when the police announced their presence. The defendant answered, "If I knew (sic) it was the police, I would have gotten a gun," and "there would have been a gunfight." The Fourth Circuit found the defendant's willingness to engage in conversation an indication of voluntariness. It was also not ready to find that sitting in the front of a patrol car with one's hands cuffed in front was the equivalent of oppressive custodial conditions. *Id.* at 390 fn 4.

The *Cardwell* defendant was neither isolated, one of the hallmarks of custodial interrogation, nor was he subjected to persistent questioning. He voluntarily, without prompting, began a conversation with the officer. The condition of driving along a road even for a lengthy period of time where the suspect is not subjected to persistent questioning is completely dissimilar to the facts at bar.

The United States argues that *Cardwell* stands for the proposition that even if not immediate, a suspect's incriminating answers manifest a waiver. But *Miranda* rejected such a formulation. 384 U.S. at 475. Incriminating answers eventually obtained do not manifest a valid waiver. They manifest the

maxim that "persistent questioning wears down a suspect's resistance forcing him to change his mind." *Moseley, supra* at 105-106.

The Michigan Court's decision in relying upon *People v McReavy*, 436 Mich. 197; 462 N.W.2d 1 (1990), was objectively unreasonable in light of the clearly established Supreme Court law. It expanded the implied waiver doctrine found in *North Carolina v Butler* to the second stage of an interrogation. In *McReavy*, the defendant was twice advised of his *Miranda* rights and agreed to speak with officers. After the waiver, he then remained silent in answer to some questions but readily answered others. The *McReavy* Court analyzed the issue as a restoration of rights that had already been waived. This will be discussed in part B.

2. The State court made an unreasonable determination that there was an implied waiver in the absence of facts to support the finding.

The Sixth Circuit also vacated the district court's decision finding a valid waiver because the State court's decision was an unreasonable determination of the facts in light of the evidence under 28 U.S.C. 2254(d)(2).

The transcript of the evidentiary hearing and testimony at trial in this case belie the contention that Thompkins impliedly waived his rights and voluntarily participated in the interrogation. The

defendant was brought to an austere 8' x 10' room at a detention facility. J.A. 144a-145a. Present in this room were two detectives, both of whom took part in questioning. The defendant was made to sit in a school chair. J.A. 21a.

After he was advised of his rights, Respondent refused to sign the acknowledgment form. The Detective offered the Respondent a mint which was refused. Respondent commented that the chair was hard. J.A. 152a. He rarely made eye contact with the officers. J.A. 11a. The interrogation lasted upwards of three hours in which the only verbal statement concerning Respondent's involvement would have been near the end of the interview. J.A. 8a, 10a.

At that point, almost three hours into the interrogation, Detective Helgert decided to take a spiritual tack by asking him if he believed in God and asking him if he prayed to God to forgive him for shooting that boy down. The Respondent, through tears, answered "Yes" to both questions. He refused to write this down. J.A. 11a. These two "Yes" answers were offered in evidence against him. The questions were asked after Respondent consistently exercised his right to remain silent for at least two hours and 45 minutes. J.A. 20a.

The officer while referring to Mr. Thompkins' sporadic answers was unable to identify anything else he said before those two inculpatory answers. J.A. 10a. Surely, if Respondent had offered any inculpatory or even exculpatory comments, the officer

would have testified to them. Instead when given the chance to expand his testimony, the officer merely characterized the conversation as "very, very one-sided," J.A. 10a and "nearly a monologue." He described the Respondent as "not verbally communicative" J.A. 17a, "largely silent" J.A. 19a, and "uncommunicative." J.A. 10a. At trial, after much prodding as to what else the Respondent may have said, the Detective remembered that he declined the offer of a mint, and unbidden, stated that the chair was hard. J.A. 152a.

These facts are a far cry from those found in the cases offered by Petitioner. The only similarity is a refusal to sign a form and here it wasn't even the advice of rights form, only the acknowledgment of rights form. Thompkins did not engage the officers in conversation about anything. He barely looked at them and barely spoke. He at no time felt empowered enough in that austere room on that hard chair to tell these officers to return him to his cell. He consistently exercised his right to remain silent. Because the officers were met with silence, they had to keep changing themes and trying different tacks to get the Respondent to talk. J.A. 10a-11a and 151a.

Detective Helgert and, consequently, the State courts could not point to anything the Respondent said of an inculpatory or even an exculpatory nature. While the Michigan Court of Appeals said that the Respondent said "I don't know," there is nothing to show to what that answer was in response. Nor was there any testimony as to what he may have nodded

his head. The testimony that Respondent was largely, consistently silent and uncommunicative and refused to look at the officers was ignored. The heavy burden was on the prosecution to prove a valid, voluntary waiver. The defendant had no burden to sustain.

An implied waiver cannot be found on these facts. Nor should it be predicated on the refusal of the mint or the assessment of the comfort level of the chair. The State court's determination of the facts was objectively unreasonable. The Sixth Circuit could not defer to the objectively unreasonable finding that there was an implied, voluntary waiver.

This Court should also reject the State's claims that the record is deficient in showing that Respondent unequivocally asserted his right. This ignores the presumptive nature of the right by shifting the burden to the defendant. Moreover, if the record is deficient, it is so because of two tactical choices made by the officers. First, they deliberately refrained from obtaining an express waiver either orally or in writing. The acknowledgment of rights form does not replace a waiver of rights form. From the failure of the officers to offer the defendant a waiver of rights form to sign, one can infer that they knew they were not going to get a waiver. In fact the officer never testified that he even asked the Respondent if he would be willing to waive his rights. He finessed the answer by talking about the Respondent's failure to sign the acknowledgment form and how they then began the interrogation, J.A. 9a and 13a-14a.

Second, the officers failed to record the session or make a verbatim record of it despite the fact that tape recording devices were available. J.A. 160a. The officers should not now be rewarded when their actions obfuscated the record preventing a meaningful assessment of the alleged waiver.

In this case, not talking for almost three hours along with a refusal to sign an acknowledgment of rights form constituted an invocation of the right to remain silent. Once Thompkins invoked his right to remain silent by refusing to talk and by refusing to sign the acknowledgment of rights form, the police were under an obligation to "scrupulously honor" his decision by immediately ceasing to question him.

Nor was Respondent's conduct ambiguous. A reasonable police officer[1] would have known that the Respondent was invoking his rights. Detective Helgert knew it, which was why he kept trying different themes to get the Respondent to talk. If there was any ambiguity, it was created by the officers themselves. They made a conscious choice not to seek an express waiver by only offering the Respondent the opportunity to sign a form which was only an acknowledgment of the receipt of rights. They made a conscious choice not to ask clarifying questions, but rather to ask substantive questions

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[1] Standard from *Texas v Cobb*, 532 U.S. 162, 176 (2001) (Kennedy, J., concurring).

about the offense. They made a conscious choice not even to ask him if he was going to waive his rights.

Under 28 U.S.C. 2254(d)(2), the Circuit Court acted properly in the ruling that the State court's decision was an unreasonable determination of the facts in light of the evidence presented in the State court.

3. In the absence of a valid waiver, either express or implied, the officers entered into a course of conduct designed to overcome Respondent's decision to exercise his right to remain silent.

The *Miranda* Court stated that an interrogation environment is created for no other purpose than to subjugate the individual to the will of the interrogator. While the atmosphere may not be one of physical intimidation it is still equally destructive of human dignity. 384 U.S. at 457. Thus any statement taken in the absence of a valid waiver is deemed to be compelled. Beside this presumption of compulsion, several other factors combined to sap Respondent's powers of resistance and self-control. *Culombe v Connecticut*, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J).

First, almost three hours seated on an uncomfortable chair in a small room dominated by two other men in authority created and maintained a coercive atmosphere. The United States as amicus curiae suggests that the duration was not coercive

and points to three cases where the time periods were either the same or exceeded the three hours that Thompkins endured. However in those cases, the defendants were not in custody.[2] The other cases the United States cites to in which the Court disapproved of lengthy interrogations are all pre-*Miranda* indicating that one of the positive effects of the *Miranda* decision was to decrease lengthy incommunicado interrogations.[3]

Second, an 8' x 10' room containing desks and chairs and three grown adults is confining, not relaxing. Respondent was also forced to sit in a chair so uncomfortable that in three hours of silence the only voluntary comment he made concerned the chair. These conditions were oppressive.

Third, the psychological aspects of the interrogation were also designed to chip away at the Respondent's resolve.[4] The officers used a classic

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[2] *Diaz v Senkowski*, 76 F.3d 61, 62-63 (2nd Cir. 1996) (Diaz was not yet formally in custody and he agreed to answer questions); *Jenner v Smith*, 982 F.2d 329 (8th Cir. 1993) (Court found that the questioning was far from custodial); *United States v Guarno*, 819 F.2d 28, 32 (2nd Cir. 1987) (Defendant was not under arrest and was discussing a cooperation agreement).

[3] *Greenwald v Wisconsin*, 390 U.S. 519, 524 fn* (1968) (Trial started before the date of the *Miranda* decision); *Davis v North Carolina*, 384 U.S. 737, 739 (1966) (in reversing the conviction, court mentioned that had the confession been taken after the *Miranda* decision, it would have summarily reversed).

[4] See *Miranda*, 384 U.S. 448-456, for a discussion of the psychological aspects of police interrogation.

softening technique. The offer of the mint and the implication that perhaps the crime was not his fault but the fault of others. J.A. 16a. The attitude they displayed towards Respondent through their comments and questions is one of the techniques taught to law enforcement officers and is designed to erode a suspect's will.[5] That the questioning was persistent was also calculated to erode his resistance. That it was conducted by two officers placed Respondent at a distinct disadvantage both psychologically and physically. When the police failed to scrupulously honor his decision to exercise his right to remain silent, Respondent found himself in a situation where there was no end in sight. That he complained about the chair but got no relief showed Thompkins that he had no power to affect his situation. That he was not participating in the conversation but that the officers would not leave exacerbated these feelings of powerlessness.

Despite the above combination of factors, Respondent refused to give up his right to remain silent. In the face of this silence, the Detective was forced to switch tacks. He appealed to Respondent's religious sensibilities. This move was calculated to wear down whatever resistance remained. No case holds that it is improper to make religious appeals. Nor has any case held that it should never be a consideration. The

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[5] Wesselberg, C., *Mourning Miranda*, California Law Review Vol. 96:1519 pp 1558-1564 (2008).

test is whether the waiver of the rights was the product of an unfettered will.

The United States writing as amicus curiae discusses several cases in which religion was a factor, but in none of them did the confession come, as it did here, hard on the heels of a religious discussion during an uncounseled, custodial interrogation where the suspect had not been engaging the police in conversation and had not agreed to talk with them. *e.g. Barrera v Young*, 794 F.2d 1264, 1267 (7th Cir. 1986) (On his third meeting with the police, on counsel's advice and with counsel on the other side of the door and easily accessible, this not-in-custody defendant confessed to a polygrapher who at some point in the discussion had mentioned his savior); *United States v Miller*, 984 F.2d 1028 (9th Cir. 1993) (No nexus found where two days after a religious discussion with a non-interrogating agent, the not-in-custody defendant confessed); *Muniz v Johnson*, 132 F.3d 214 (5th Cir. 1998) (Defendant was in custody and at one point the officer offered to get the defendant a priest, but it was only after being a shown a photograph of the body of the victim that Muniz confessed); *Brewer v Williams*, 430 U.S. 387, 397-398 (1997) (In this "the Christian burial speech" case, the court never reached the issue, instead reversing on effective assistance of counsel grounds). Religious appeals should be one of the factors considered because the test for voluntariness is a broad one, whether the waiver and the admissions were the product of a free choice. Here, the effect of

the appeal was to put the Respondent in such an emotional State that his capacity for rational judgment was impaired. *Miranda,* 384 U.S. at 465.

Following *Miranda* procedures was supposed to dispel the coercion inherent in custodial interrogation, but everything the officers did in this case maintained and increased the coercive atmosphere. Coercion occurred where the police forced Respondent to sit in an uncomfortable chair, failed to honor the exercise of his right to remain silent, badgered him for almost three hours, and then appealed to his religious feelings whereupon his will was overborne. There was no express waiver of the right to remain silent. There was no implied waiver. In a system where the voluntariness of a confession depends not only on whether it is the result of a free choice but also on whether the interrogator's techniques "are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means,"[6] the two "Yes," answers should have been excluded from evidence.

The State did not meet its heavy burden in proving a valid, voluntary waiver of the right to remain silent. Thompkins' refusal to sign an acknowledgment form followed by a lengthy incommunicado interrogation was strong evidence that any alleged waiver was not voluntary, *Miranda,* 384 U.S. at 475. The State's own witness described the

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[6] *Miller v Fenton*, 474 U.S. 104, 115-116 (1985).

defendant as consistently exercising his right to remain silent, as being uncommunicative and largely silent. The officers made statements designed to undermine the Respondent's decision to remain silent. It was only after being continually badgered by two officers for almost three hours that Respondent's will was overborne. The two "Yes" answers even without the coercive nature of the subsequent interrogation, are presumed to be compelled. The State's evidence that the Respondent answered "I don't know" and nodded a few times without being able to point to what these actions were in response, neither rebuts the presumption that the right is being exercised, nor meets the heavy burden of proof that there was an implied valid waiver.

Respondent's two answers were not the product of his unfettered will. The Circuit Court's decision that the State court's decision was an unreasonable application of clearly established supreme court law and also that the State court's decision was based on an unreasonable determination of the facts in light of the evidence must be affirmed.

C. There is no clearly established Supreme Court law applying the assertion requirement of *Davis v United States* either to the initial stage of the interrogation or to the right to remain silent.

It is evident from the facts of this case that the two "Yes" answers were not the product of an

unfettered will. Because the State can show neither an express waiver, nor an implied waiver, nor any facts to support the notion that, after three hours of badgering, somehow the answers were voluntary, it now argues that the Respondent had a duty to assert his right to remain silent under *Davis v United States*, 512 U.S. 452 (1994). Since *Davis* concerns the restoration of rights waived, the State cannot prevail on that theory either.

In *Davis*, the Court held that where there has been a valid waiver of the rights and where, during subsequent interrogation, the suspect ambiguously asserts the right to counsel, the police may continue questioning without asking any clarifying questions. An unambiguous assertion, however, will be deemed an invocation of the right after which all questioning must cease. The Court addressed itself narrowly to the facts before it, "We therefore hold that, *after a knowing and voluntary waiver of the* Miranda *rights*, law enforcement officers may *continue* questioning until and unless the suspect clearly requests an attorney." *Id.* at 461 (emphasis added).

Davis, then, is a case concerned with the restoration of the right to counsel. It envisions a two-stage interrogation. In the first stage, Davis waived his rights, both orally and in writing, and answered questions. The second stage occurred when the defendant mentioned with some uncertainty that perhaps he should consult with counsel. The opinion itself was narrowly drawn applying only to the right to counsel and only to post-waiver situations. Thus,

as clearly established Supreme Court law, the *Davis* case applies only to the right to counsel and only to situations where the suspect initially waives his rights and then appears to renege.

Petitioner, while arguing that the Sixth Circuit expanded the *Miranda* decision, is actually seeking a two-fold expansion of *Davis*. It seeks to have it apply not only to the right to remain silent, but also to the initial stage of the interrogation. Since no clearly established federal law as determined by the Supreme Court has done so and since it would be unreasonable to apply such a rule in the context of the right to remain silent, the Sixth Circuit did not err. The Sixth Circuit did not even reach the *Davis* issue "[b]ecause the resolution of this issue is not critical to the outcome of this case – that is, we conclude that the prosecution failed to meet its 'heavy burden' in first showing that Thompkins waived his *Miranda* rights – we need not address Thompkins' arguments that the *Davis* standard does not apply to invoking the right to remain silent." *Berghuis v Thompkins*, Res. App. 9a n.4.

1. The *Davis* rule should not be applied to the initial stage of the interrogation, nor should it be applied to the right to remain silent.

Requiring a suspect to assert his Fifth Amendment right removes the presumption granted him under the Constitution.

Although several circuits have applied the *Davis* requirement to the right to remain silent, they did so with little or no explanation.[7] Only, the Second and the Ninth Circuits looked to the reasoning behind *Davis* and, in so doing, found it not applicable to the initial stage of the interrogation. The Ninth Circuit concluded that such an application would be incompatible with the historic presumption against finding a waiver of constitutional rights, a presumption imported into *Miranda* with the concomitant heavy burden to prove a waiver before questioning may begin. *Davis*' concern was for the practical problems interrogating officers encounter if the Court was to decide that ambiguous statements concerning lawyers would trigger the *Edwards*[8] duties. Should the interrogation of a suspect which is producing valuable evidence be stopped merely based on an ambiguous statement about a lawyer? But at the initial stage, there is no interrogation because no

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[7] *United States v Nelson*, 450 F.3d 1201, 1211-12 (10th Cir. 2006) (referred to the weight of authority and agreed with its reasoning; *Coleman v Singletary*, 30 F.3d 1420, 1424 n.5 (11th Cir. 1994) (the justifications apply with equal force . . . and because we have previously held that the same rule should apply in both contexts . . .); *United States v Banks*, 78 F.3d 1190 (7th Cir. 1996) (If *Davis* does not require the cessation of all questioning where the right to counsel invocation is ambiguous, then *Davis* does not permit such a rule in relation to the right to remain silent).

[8] *Edwards v Arizona*, 451 U.S. 477 (1981) (Questioning must cease if the defendant requests counsel and may not be resumed without counsel unless the defendant initiates contact).

rights have been waived and an ambiguous statement thwarts nothing. Thus, *Davis* is understandable only in the context of an ongoing interrogation which would be interrupted by the need to clarify ambiguous remarks. *United States v Rodriquez*, 518 F.3d 1072, 1079-1080 (9th Cir. 2008). An officer should not have to interrupt the flow of questions to determine whether a statement as to counsel is an ambiguous assertion of the right or an unambiguous assertion. With the right to remain silent, no flow of questions has begun because no valid waiver, either express or implied, has been obtained. The Ninth Circuit put off for another day the question of whether the *Davis* requirement should apply to the right to remain silent at the second stage of an interrogation.

The Second Circuit, in refusing to expand *Davis*, pointed out that an initial waiver was critical to the *Davis* Court's thinking because an understanding of the rights and a valid waiver dispel the coercion inherent in the interrogation process. In their absence, the police have no right to question a suspect. Thus the Second Circuit found that the refusal to sign a waiver of rights form even along with a statement "I am not sure if I should be talking to you" and "I don't know if I need a lawyer" constituted an invocation of the Fifth Amendment rights. *United States v Plugh*, 576 F.3d 135, 142-143 (2nd Cir. 2009). The assertion requirement, it noted, was fashioned to avoid transforming the *Miranda* rights into "wholly irrational obstacles to legitimate

police investigative activity." Quoting *Davis, supra* at 460. It was premised on the notion that "a suspect not use the Fifth Amendment as a sword to excise unfavorable evidence after discarding it as a shield." *Plugh, supra* at 143. If a valid waiver has not been obtained, the shield is still raised.

Most State courts to consider the issue limit the rule in *Davis* to the post-waiver scenario. See *Plugh, supra* at 1079 fn 6 for a collection of cases. One other federal court found *Davis* to be a post-waiver case. *United States v Eastman*, 256 F.Supp.2d 1012, 1019 (D.S.D. 2003).

Rejecting the bright-line rule of *Miranda* will invite the ingenious officer to invent new stratagems to produce colorable waivers. And despite the assurances of *Miranda* that a defendant does not have to speak like an Oxford don in order to assert the right,[9] the police and courts have been quick to interpret obvious comments on silence as ambiguous.[10] On the other hand, officers who want to comply with the Constitution will find it more difficult to do so. It will also increase the burdens on courts when asked to apply *Miranda*.

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[9] *Davis, supra* at 459.

[10] See *Anderson v Terhune*, 516 F.3d 781 (9th Cir. 2008) (Not until en banc review did a court finally find that "I'll plead the Fifth" was an unambiguous assertion of the right).

Expanding *Davis* to the initial stage and to the right to remain silent will also be unfairly disadvantageous to the poorest, least powerful, and least sophisticated; those, in short, who need the constitutional protections most. For instance, many suspects under custodial interrogation may use indirect or tentative speech patterns or use verbs like "maybe, might, or could." Women and members of certain cultures tend to use hedges in normal speech because they are not used to making demands.[11] Custodial interrogation exacerbates these tendencies. This is also true of people at the lowest rung of society such as Respondent who could not even ask for another chair. What may appear to be an ambiguity to a person in power may not be an ambiguity to the person who is acting as assertively as he or she knows how.

Since the right to remain silent is a right retained until waived and does not need a formal invocation, no right needs to be restored. To require an unambiguous assertion of the right in both the initial stage and any subsequent stage would also unfairly shift the burden of proof. A defendant would have to show an explicit assertion of the right while the prosecution could prove admissibility by only

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[11] Strauss, Marcy, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda* (2008) pp 17-19. The author is a professor of law at Loyola Law School. The paper can be accessed online at Social Science Research Network.

showing an implied waiver. The right to remain silent is also self-activating in that a suspect does not need the aid of a law enforcement official to exercise it, unlike the right to counsel.

The bright-line rule of *Miranda* was a stroke of jurisprudential genius, an elegant solution to the huge volume of cases clogging the courts with involuntariness issues under the totality of the circumstances test. To apply an assertion requirement to the right to remain silent and to permit unlimited questioning by officers will only increase, not decrease litigation. By declining to extend *Davis* this Court will preserve the balance between law enforcement interests in obtaining evidence and a suspect's Fifth Amendment rights. *Moran v Burbine*, 475 U.S. 412, 426 (1986).

Mr. Thompkins did not waive his right to remain silent. He unequivocally asserted it by exercising it. At that point, the police had to stop their interrogation. But even if this Court found that silence was an ambiguous assertion of this retained right, a reasonable officer would have asked a clarifying question. The officers here did not ask any clarifying questions.

2. A rule permitting pre-waiver interrogation would overrule all of *Miranda v Arizona* except for that part of it which requires the police to read a suspect his or her rights.

Petitioner contends that no case forbids the police from continuing to question between the warnings and the waiver. The United States as amicus curiae refers to this as pre-waiver interrogation. This contention is a misreading of *Miranda* and its progeny. The presumption is that the suspect has the right to remain silent, so any questioning done in the absence of a waiver is done in violation of *Miranda*. It ignores the fact that without giving the suspect the opportunity to waive his rights, the compulsion inherent in the custodial interrogation setting is not dispelled. *Miranda* envisioned that a suspect would have an opportunity for the right to be exercised. 384 U.S. at 467. A pre-waiver interrogation rule omits the opportunity. It would also result in badgering or overreaching which whether explicit or subtle, deliberate or unintentional, might otherwise wear down the accused and persuade him to incriminate himself. *Smith v Illinois*, 469 U.S. 91, 95 n.2 (1984).

Adoption of such a rule will result in exactly what occurred in this case where no attempt was made to obtain a waiver and where the questioning was lengthy and persistent. The interrogation will include all the psychological ploys *Miranda* decried which break down the will of the individual so that

his choice to speak or remain silent will not be unfettered, only forced. Such a rule tips the delicate balance *Miranda* sought to maintain between the suspect's Fifth Amendment right and the police need to investigate in favor of the latter. As the *Miranda* Court noted, the procedures it was adopting do not forbid the police from utilizing other avenues of investigation. 384 U.S. at 477. It only forbids them from trampling on one of our Nation's most cherished principles – that an individual may not be compelled to incriminate himself.

A pre-waiver interrogation rule is inconsistent with the rationale behind *Davis* and inconsistent with the efforts of *Miranda* to dispel the coercive effects of custodial interrogation. Adopting Petitioner's position would eviscerate *Miranda* because it is not just the advice of rights which dispels the coercive atmosphere. It is also the respect accorded to the individual's decision to exercise those rights which makes custodial interrogation consonant with an accusatorial system of justice rather than an inquisitorial one. The police only have the right to question a suspect after obtaining a valid waiver. No waiver, no questions. If the suspect chooses to exercise the right simply by remaining silent, the police must honor that decision.

Such a rule is reminiscent of the Missouri two-step held to violate *Miranda* in *Missouri v Seibert*, 542 U.S. 600, 621 (2004). In that case, warnings were given mid-interrogation. The Court found that, in reality, this resulted in a suspect having no real

choice about whether to exercise his rights because the barn door was already opened. Justice Kennedy in a concurring opinion found such a technique to be a distortion of *Miranda* with no legitimate countervailing interest being served. *Id.* at 621 (Kennedy, J., concurring).

Permitting the interrogation to proceed, post-advice of rights but without first requiring a waiver, is another attempt at a radical revision of Fifth Amendment law. Waivers obtained as a result of this procedure will not be the product of an unfettered will. They will be the result of an officer ignoring all attempts by a suspect to exercise the right to remain silent until the suspect after enduring hours of questioning gives in, signs a waiver form, and then signs a confession.

An expansion of *Davis* and the adoption of a pre-waiver interrogation rule would leave *Miranda* toothless. It would become just general principles having "little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality." *Miranda*, 384 U.S. at 443-444, quoting from *United States v Weems*, 217 U.S. 349, 373 (1910).

D. The Circuit Court did not expand the law found in *Miranda v Arizona* because that opinion allows a suspect to exercise his right to remain silent in any manner and also requires the police to scrupulously honor the exercise of that right.

Petitioner cites to *Carey v Musladin*[12] and *Wright v Van Patten*[13] to argue that the Sixth Circuit went beyond the right created by this Court's clearly established law. In both of those cases involving State court convictions, principles expressed by this Court were modified by the Courts of Appeals to apply to the case before them. In *Carey*, the Ninth Circuit, relying on *Estelle v Williams*, 426 U.S. 501 (1976), a case in which a defendant forced to wear prison garb by the State during trial was denied a fair trial, held that where family members wore buttons with photos of the deceased at defendant's murder trial, he was denied due process. The Supreme Court held that the *Estelle* case applied only to government-sponsored conduct, not to private conduct. In *Wright*, this Court reversed a Seventh Circuit decision extending the holding in *United States v Cronic*, 466 U.S. 648 (1984) that the prejudice prong of *Strickland* is not applicable to the complete absence of counsel, to instances where counsel is present via speaker phone but is absent physically. This Court noted that no

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[12] 549 U.S. 70 (2006).

[13] 128 S. Ct. 743 (2008).

precedent addressed the presence of counsel over a speaker phone.

The Sixth Circuit made no modification of existing law to reach the decision it did in this case. First, the *Miranda* Court's holding that the right to remain silent could be asserted in any manner is broad to begin with. The *Moseley* Court's prohibition on persistent questioning encompasses what occurred here. Placing the burden on the State to prove the intentional relinquishment of a known right is squarely within the holdings of *Colorado v Connelly*, 479 U.S. 564 (1987) and *North Carolina v Butler*. The burden is not met where the police engaged in a course of conduct which would render the waiver involuntary. *Michigan v Harvey*, 494 U.S. 344, 354 (1990).

This case is analogous to the decision in *Edwards v Arizona*, 451 U.S. 477 (1981) where the Court refused to recognize a valid waiver of the right to counsel where the defendant had been badgered into forgoing the right. The *Edwards*' prophylactic rule was designed to preserve the free choice of the suspect to remain silent. *Texas v Cobb*, 532 U.S. 162, 173 (2001) (Kennedy, J., concurring).

The decision of the Michigan Courts was based on an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. 2254(d)(1). It is contrary to clearly established federal law as determined by the Supreme Court of the United States in the above

cases. 28 U.S.C. 2254(d)(1). It also resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. 28 U.S.C. 2254(d)(2). The Sixth Circuit could not decide this case in any other way without violating the strictures against making new law on habeas review. 28 U.S.C. 2254(d).

Furthermore, since this case could be resolved within clearly established Supreme Court law, it was not unreasonable for the Sixth Circuit to decline to reach the *Davis* issue.

CONCLUSION

Petitioner is asking this Court to continue the slow erosion of safeguards the *Miranda* Court deemed necessary to protect a person's Fifth Amendment right. It asks this Court to find that an officer can give the advice of rights and proceed to question a suspect in the absence of a waiver, while the United States asks this Court to focus its waiver analysis only on a suspect's answer to the questions[14] which elicited the inculpatory answers rather than on, for instance here, the previous three hours. If these suggestions were to be adopted, they would sweep *Miranda* and its progeny into the dustbin of history.

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[14] Brief for the United States, page 25.

II.

THE SIXTH CIRCUIT COURT OF APPEALS DID NOT IMPROPERLY APPLY THE 28 U.S.C. 2254d DEFERENCE STANDARD WHEN IT GRANTED HABEAS RELIEF BASED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

To find that a defendant's right to the effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show 1) that counsel's performance fell below an objective standard of reasonableness, and 2) that the deficient performance prejudiced the defendant. As to the second prong, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v Washington*, 466 U.S. 668, 687-688, 694 (1984). The court specifically rejected the more stringent standard of "more likely than not." *Id.* at 693. In applying the reasonable probability standard, the court must re-weigh the evidence. *Williams v Taylor*, 529 U.S. 362, 397-398 (2000); *Porter v McCollum*, 558 U.S. ___; 130 S. Ct. 447 (2009) (in applying the reasonable probability standard to the facts on the prejudice prong the available evidence adduced at trial and adduced in the habeas proceeding must be re-weighed against evidence of aggravation). While *Porter* concerned the mitigation phase, there is no reason to think that there is a different test for the guilt phase of a trial.

Both prongs of the *Strickland* test are mixed questions of law and fact to which deference was not owed pre-1996. *Strickland, supra* at 698. The 1996 amendment to 28 U.S.C. 2254(d), AEDPA, placed a new constraint on the power of federal habeas courts to grant the writ to State prisoners. It may do so only if the State court's decision was contrary to or was an unreasonable application of clearly established law as determined by this Court. *Williams v Taylor, supra* at 412-413; 28 U.S.C. 2254(d)(1). The *Williams* case did not address subsection (d)(2) which permits issuance of the writ where the State court's decision was based on an unreasonable determination of the facts.

This case concerns the prejudice prong of *Strickland*. Because the State court's decision was contrary to clearly established law in relying on a rule that was not clearly established and because the State court applied *Strickland* to the facts of this case in an objectively unreasonable manner, deference is not owed to the State court's decision on the prejudice prong.

A. The Sixth Circuit correctly found that the State courts adopted an objectively unreasonable test on the prejudice prong under *Strickland v Washington*.

Respondent's theory at trial was that Eric Purifoy was the shooter. The prosecution established that Eric Purifoy had been charged with the same crimes as the defendant, had been charged as an

aider and abettor, had been acquitted of the murder and assault charges, had been convicted of one weapons charge, and had pled guilty to two other weapons charges on which the jury had hung. J.A. 139a-141a.

In his closing argument, the prosecution started off as follows:

> Ladies and Gentlemen, this is a case about the relationship between these two people. At Eric Purifoy's trial, the jury had to find, in order to find him guilty of first degree murder, that he drove up to that Rite Aid and sat there, thereby assisting Van Thompkins. . . . Did Eric Purifoy's jury make the right decision? . . . You are not bound by what his jury found. Take his testimony for what it was.

Prosecutor's Closing Argument, J.A. 201a-202a.

Counsel failed to request limiting instructions at the time the above evidence was elicited and also limiting instructions in the final charge to the jury. The court instructed the jury that it could "convict based only on the accomplice's testimony alone. . . ." J.A. 214a. Counsel also failed to ask for an instruction that evidence that Purifoy was tried on a theory of aiding and abetting was opinion testimony and could be disregard. The trial court found the admission of this evidence to be plain error, but it did not affect the outcome. J.A. 235a-236a.

The failure to request limiting instructions meant that Petitioner's jury could consider this evidence as substantive evidence of Respondent's guilt. A limiting instruction would have directed the jury to consider the evidence only on the issue of Purifoy's credibility. In Michigan, had the request been made the court would have had to give the instruction pursuant to the decision in *People v Allen*, 424 Mich. 109; 378 N.W.2d 481 (Mich. 1985) (Upon request, the jury must be given a cautionary instruction that they can only use an accomplice's conviction to assess credibility).

On the motion for new trial, along with other claims of attorney error,[15] the trial court found that the "failure to request certain jury instructions . . . [was] error. However, the court did not find that, but for the error, the results of the proceeding would have been different." J.A. 236a. The trial court also did not find the use of the acquittals to be error. J.A. 235a.

The State appellate court accepted the trial court's finding on the performance prong. It stated that the burden on an ineffectiveness claim was on the defendant "to show that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial." It cited to *People v Mitchell*, 454 Mich. 145, 156; 560 N.W.2d 600 (1997).

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[15] J.A. 234a-237a.

Res. App. 55a. On the prejudice prong, the court stated, "we also agree with the trial court that defendant was not prejudiced by defense counsel's failure to request certain jury instructions. Although the court did not specifically instruct the jury that it could consider Purifoy's conviction only for purposes of his credibility, the record does not disclose an attempt to argue that conviction for an improper purpose." Res. App. 56a.[16]

The Circuit Court found that if the evidence of Purifoy's convictions and acquittals was used substantively by the jury because no limiting instruction was requested by counsel then "a reasonable probability exists that the jury understood Purifoy's acquittal as powerful evidence that Thompkins, the only other individual in the front seat of the van, must have been the shooter." Res. App. 16a.

Petitioner claims that the Sixth Circuit Court of Appeals erred in deciding the prejudice prong because it focused on its own determination of prejudice rather than focusing on whether the State court's decision was unreasonable. This claim is erroneous for two reasons. First, the State court used an erroneous definition of prejudice. The appellate court

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[16] Despite the fact that this is not a factor to be considered on the prejudice prong as is discussed *infra*, the prosecutor in the passage reproduced above did argue the evidence improperly.

applied a fundamental fairness test rather than an outcome determinative test. The use of the fundamental fairness language found in *Lockhart v Fretwell*, 506 U.S. 364 (1992), neither replaced nor modified the *Strickland* standard for determining prejudice. *Fretwell, supra* at 372 (O'Connor, J., concurring). This was an unreasonable application of the clear law as established by *Strickland*. As Justice O'Connor pointed out in her concurring opinion in *Williams,* it is impossible to determine the extent to which the State court's error with respect to its reading of *Lockhart* affected its ultimate finding that the defendant suffered prejudice. *Williams, supra* at 414. So even if the Michigan court relied on a case which relied on a case that cited the correct standard, a reviewing court cannot assess how much the use of the inapplicable standard affected the State court's decision on the prejudice prong.

Second, the Circuit Court found that the State appellate court had added an additional burden for the defendant to meet when it held that prejudice required a showing that the prosecution used Purifoy's conviction for an improper purpose. It noted that the prosecution's intent is irrelevant in analyzing prejudice from attorney error. No such showing is required. The State court made no other analysis of the evidence.

This error is different qualitatively from that found in *Woodford v Visciotti*, 537 U.S. 19 (2003). That error was merely a slight misstatement of the standard and the correct standard was still applied.

In this case the standard applied was not based on clearly established Supreme Court law and it was applied in an objectively unreasonable fashion.

Because the State court applied the wrong standard for prejudice, failed to evaluate the totality of the admissible evidence, and failed to accord appropriate weight to the evidence, deference is not owed. Consequently, the Circuit Court correctly found that the Michigan court applied the prejudice prong in an objectively unreasonable manner. Res. App. 15a-16a.

B. Any extra latitude a State court may have in applying general rules to a set of facts does not insulate it from all habeas review.

Petitioner contends that a State court has extra latitude in making its determination because the standard of prejudice is a general rule. In *Yarborough v Alvarado*, 541 U.S. 652, 664 (2004), this Court noted that

> Applying a general standard to a specific case can demand a substantial element of judgment. . . . The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

The *Alvarado* Court was concerned with whether a 17-year old suspect's age should be considered when determining custodial status, not with a prejudice standard.

In *Knowles v Mirzayance*, ___ U.S. ___; 129 S. Ct. 1411, 1420; 173 L.Ed.2d 251 (2009), also cited by Petitioner, this Court held that since the performance prong of *Strickland* was a general rule, analysis of it was owed a high degree of deference. "Judicial scrutiny of counsel's performance must be highly deferential . . . " quoting *Strickland, supra* at 689. *Strickland* said that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms. *Id.* at 688. It is this standard which *Knowles* deems general permitting a State court even more latitude to reasonably determine that the defendant has satisfied it. *Knowles, supra* at 1420. *Knowles* states no new law in this regard. Deference has always been accorded to counsel's strategic decisions. But *Knowles* addressed only the performance prong not the prejudice prong of *Strickland*.

But even if this court holds that *Knowles* also applies to the prejudice prong, the judgment which is to be given wide latitude must start with a correct formulation of the principle to be applied. As was shown above, the State court used an incorrect definition of prejudice. That incorrect definition resulted not merely in an incorrect application of the law, but in an objectively unreasonable application of the law. This will be discussed at greater length in part D, *infra*. AEDPA does not prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those in the case in which the principle was

announced. The statute recognizes that even a general standard may be applied in an unreasonable manner. *Panetti v Quarterman*, 551 U.S. 930 (2007). Deference does not by definition preclude relief. *Miller El v Dretke*, 545 U.S. 231, 240 (2005).

Consequently just because a standard is stated in general terms does not always mean that it was applied reasonably. State courts do not have a blank check to determine at their whim whether counsel's deficient performance prejudiced the defendant.

C. Respondent will reap no windfall in this case.

Petitioner contends that the *Fretwell* case aids analysis here. If it does so, it does so in Respondent's favor. The *Fretwell* case added the meritless objection to the list of factors that ought not to be considered in a prejudice analysis.[17] In *Fretwell,* trial counsel failed to make a *Collins*[18] objection during the mitigation phase. After Fretwell's trial, the *Collins* rule was abandoned. If Fretwell's conviction was overturned, at a retrial the unobjected-to evidence would be admissible. He would have obtained a windfall

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[17] The other factors include a failure to put on perjured testimony and meritless Fourth Amendment claims. *Lockhart, supra* at 374.

[18] *Collins v Lockhart*, 754 F.2d 258 (8th Cir. 1985) (An aggravating factor may not duplicate an element of the underlying felony murder).

because counsel's error would no longer be considered error. Justice O'Connor described the *Fretwell* case as one that "concerns the unusual circumstances where the defendant attempts to demonstrate prejudice based on considerations that as a matter of law ought not to inform the inquiry." *Fretwell, supra* at 372.

Respondent's case is not *Fretwellian*. The law at the time of his trial required that upon request a jury be instructed on the uses it could make of an accomplice's acquittals and convictions. Unlike *Fretwell*, that is still the law. On retrial, the jury would be properly instructed. Rather than getting a windfall, Respondent would only receive what he had a right to receive, the effective assistance of counsel in obtaining a properly instructed jury.

Petitioner raises concerns about a lawless decisionmaker. Such a concern is not present in this case. Respondent is not arguing that the jury disregarded its oath or ignored its instructions. The problem here is that the jury remained uninstructed on the relevant law on this key issue. The notion that convictions are used for one purpose and not for another is a pretty sophisticated idea for jurors to stumble across on their own. Respondent's jury, uninstructed, would have used the gun convictions to infer that Respondent had ready access to one of Purifoy's weapons and would have used the acquittals to infer that defendant was the shooter.

D. The Sixth Circuit correctly found that there was a reasonable probability that counsel's deficient performance prejudiced Respondent.

Both the trial court and the State appellate court, engaged in little analysis of the facts. When that occurs, a habeas court must be permitted, as required by *Strickland*, to engage in a complete review of the facts, otherwise, it cannot fairly arrive at a determination as to whether the error affected the outcome of the trial. In reviewing the totality of the evidence, "some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have an isolated, trivial effect." *Strickland, supra* at 695-696.

On the most important aspect of Respondent's claim of ineffective assistance of counsel, that of guilt by association, the State courts held it to be a serious mistake of counsel to fail to object to prosecutorial references to a co-defendant's convictions but found that he was not prejudiced by the evidence. This error, however, prejudiced Petitioner even more than in the usual case because here the jury verdict was not guilty. Testimony showed that the weapon was fired from the front seat of the car. J.A. 71a-72a. If one of the two people sitting in the front seat was acquitted of the crime, that would only leave the other person as the shooter. In this case, by this process of elimination the jury returned a guilty verdict as to Respondent. Another error concerned

Detective Helgert's opinion evidence offered to Respondent's jury that Purifoy was charged under an aiding and abetting theory. The trial court found this to be plain error but harmless. J.A. 235a-236a.[19] The failure to request an instruction on opinion testimony resulted in the corroboration of the prosecution's own theory of the case and the bolstering of the credibility of its star witness, Eric Purifoy.

The evidence against Respondent was also highly contradictory on significant points. The shooter was identified as being right-handed by the survivor. J.A. 89a. Yet two of defendant's witnesses described the defendant as left-handed. J.A. 99a. The survivor also described the shooter as light-skinned while defendant is dark complected. Three officers testified that the survivor used the phrase "light-skinned" to describe the shooter. J.A. 196a-198a. The survivor also failed to pick appellant out of a photo array, picking out another person instead. J.A. 97a-98a.

Evidence of an in-court identification based on a problematic show up procedure followed by a failure

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[19] Trial counsel had adopted a defense that was completely counter to State law which eradicated the distinction between principal and aiders and abettors in 1855. MCL 767.39; *People v Stratton*, 1 Mich. NP 33 (1869). Both classes of actors are informed against under the same statute, the jury is almost always instructed on aiding and abetting, and upon conviction they face the same penalty. The transcript of Purifoy's trial has not been made a part of this record. Defendant's jury was charged on aiding abetting. J.A. 216a-217a.

to identify the defendant at another pre-trial identification procedure is not strong evidence when it merely places the defendant at the scene just as Purifoy was placed at the scene but was found not guilty of the murder. Nor would the prosecution's adoption of an aiding and abetting theory have been viable since Purifoy was tried on that theory and not convicted.

In reviewing the prejudice prong, the Sixth Circuit held that there was a reasonable probability that the respondent's jury "understood the Purifoy acquittal as powerful evidence that Thompkins, the only other individual in the front seat of the van, must have been the shooter." Res. App. 16a. The errors here had a pervasive effect on the inferences to be drawn. There was a reasonable probability that without this error the outcome of the trial would have been different.

The Sixth Circuit Court of Appeals could not defer to the State court's application of the wrong standard for prejudice. Nor could it give complete deference to the State court's evaluation of the evidence where the State court failed to re-weigh the admissible evidence and failed to accord appropriate weight to the evidence. Consequently, the Circuit Court correctly found that the Michigan Court applied the prejudice prong in an objectively unreasonable manner.

This Court should affirm the decision of the Sixth Circuit.

CONCLUSION

For these reasons, Respondent asks this Court to affirm the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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REPLY BRIEF

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No. 08-1470

In The
Supreme Court of the United States

MARY BERGHUIS
Petitioner,

v.

VAN CHESTER THOMPKINS
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

There are two primary errors that underlie Thompkins's analysis on the *Miranda* claim.

First, Thompkins fails to recognize that this Court does not impose new rules on State courts when examining the reasonableness of a decision under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254 *et seq*. Thompkins proposes new and incompatible rules expanding *Miranda*. One seeks to impose an "immediacy requirement" after the provision of the rights under *Miranda* in order for an implied waiver to be valid. The other asks that this Court exclude pre-waiver interrogation, effectively asking this Court to overrule *North Carolina v. Butler*. These are not clearly established rules, but rather are new rules that cannot be imposed on habeas review.

The clearly established law from this Court provides that a waiver can be inferred from the actions and words of the person interrogated. This Court expressly stated in *Butler* that there might be an implied waiver in the circumstance in which a person remains silent in response to his rights but indicates an understanding of these rights and engages in a course of conduct that indicates a waiver. The Michigan Court of Appeals did not act unreasonably in concluding that Thompkins impliedly waived his rights. He read out loud from the waiver form, expressly acknowledged his rights, provided some limited responses during the interview, did not invoke his right to cut off questioning, and then specifically answered questions that implicated him in the crime. The conclusion that this was an implied waiver was not objectively unreasonable. Thompkins's contention

that his will was overborne is untenable. There was nothing coercive about the interview.

Second, the Michigan Court of Appeals did not reach an unreasonable conclusion in determining that Thompkins never invoked his right to remain silent. Thompkins never clearly indicated in any manner that he was unwilling to submit to questioning. Knowing that he did not need to respond, Thompkins answered a series of questions implicating him. There was no invocation of his right to remain silent. This conclusion is confirmed by this Court's analysis in *Davis v. United States,* which requires an unambiguous assertion of one's right to counsel. The justification underlying this Court's decision in *Davis v. United States* applies here – the police need not cease interrogation based on Thompkins's conduct even if this Court interpreted his conduct as an ambiguous assertion to remain silent.

Regarding Thompkins's claim of ineffective assistance of counsel, there was no reasonable probability that a jury instruction that limited the jury's consideration of Eric Purifoy's acquittal would have affected the verdict. The jury in Purifoy's trial was never asked to determine whether he was the shooter, only whether he was an aider and abettor – a claim that it rejected. Thus, the fact that Purifoy's jury had already acquitted Purifoy did not contradict Thompkins's theory of innocence at trial. Moreover, this instruction would have had no bearing on the foundations of the evidence against Thompkins – Frederick France's identification, Thompkins's confession to a civilian witness (Omar Stephens), and Thompkins's guilty conduct after the crime. This Court should reverse.

ARGUMENT

I. The Michigan State courts did not reach an objectively unreasonable decision in ruling that Thompkins impliedly waived his right to remain silent.

In order to merit relief when challenging his conviction for a proceeding in habeas corpus, Thompkins was required to demonstrate that the decision of the Michigan Court of Appeals was "contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent under 28 U.S.C. § 2254(d). The clearly established law must be drawn from the holdings of this Court, not from obiter dictum.[1] And in order to qualify for relief, the State court decision has to be more than merely "incorrect," it has to be "objectively unreasonable."[2]

The Michigan Court of Appeals rejected Thompkins's claim that he had implicitly invoked his right to remain silent. The Michigan Court found that Thompkins was advised of his rights and verbally acknowledged them. Pet. App. 75a. The Michigan Court also found that Thompkins refused to sign the advice of rights form, but continued to talk with the police, "albeit sporadically." Pet. App. 75a. It then affirmed the State trial court's determination that Thompkins had validly waived his right to remain silent. Pet. App. 75a. The State trial court concluded that Thompkins waived his right by his conduct:

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[1] *Williams v. Taylor*, 529 U.S. 362, 403-404 (2000) (O'Connor, J. for the Court).

[2] *Williams*, 529 U.S. at 409, 411-412 (O'Connor, J. for the Court).

> The defendant never invoked his right to remain silent, and participated in the interview by making eye contact, nodding, and answering questions with "I don't know." Defendant then answered the two questions at issue. Defendant knowingly and intelligently waived his rights. [J.A. 28a.]

This conclusion was not objectively unreasonable. Thompkins impliedly waived his right to remain silent when he incriminated himself knowing that he did not need to answer the questions of the police officers.

Thompkins attempts to blunt the significance of *Butler* by adding an "immediacy requirement" for an implied waiver to be valid – that is, that the implied waiver may only occur shortly after providing an accused his rights under *Miranda*. Resp. Br. 19. This would be a new rule if imposed in this case. Thompkins also argues alternatively that all pre-waiver interrogation should be prohibited, effectively asking this Court to overrule or limit *Butler*, rejecting the legal principle that a waiver may be implied through an understanding of one's rights and a course of conduct that indicates waiver. This Court does not impose new rules onto the State courts on habeas review to provide a criminal defendant relief.

Thompkins further contends that he only confessed because his will was overborne. This claim is rebutted by the record. The Michigan Court of Appeals reasonably concluded that Thompkins's implied waiver here was voluntary.

A. The law from the United States Supreme Court is that a waiver of one's rights under *Miranda* may be inferred from the actions and words of the accused.

This Court in *North Carolina v. Butler* specifically rejected the conclusion that a waiver of a suspect's rights under *Miranda* and the Fifth Amendment must be express.[3] Rather, this Court noted that depending on the particular facts surrounding the case that there might be an implied waiver:

> [I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.[4]

This Court further explained that it could not exclude the possibility that there were circumstances in which "silence," when coupled with other factors, might nevertheless be consistent with a finding of waiver:

> The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may

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[3] *North Carolina v. Butler*, 441 U.S. 369, 375-376 (1979).

[4] *Butler*, 441 U.S. at 373.

> never support a conclusion that a defendant has waived his rights.[5]

In other words, this Court identified circumstances in which a defendant might be silent when informed of his rights but nevertheless later waive those rights.

That is what occurred in *Butler*. The accused "said nothing when advised of his right to the assistance of a lawyer."[6] Also, "[a]t no time did [he] request counsel or attempt to terminate the agents' questioning."[7] Significantly, the accused in *Butler* specifically refused to sign "the waiver" on the advice of rights form.[8] This Court stated that the accused agreed to speak with the agents, and explained – without specifying a time – that he "then" made inculpatory statements.[9]

That is also what occurred here. As found by the State trial court, Thompkins was specifically informed of his rights and he verbally acknowledged them. J.A. 26a. In particular, Thompkins read out loud his fifth right on the notification form that essentially stated that he may exercise his rights at any time, regarding his right to remain silent or speak with an attorney. J.A. 146a. Thompkins never asked to speak with an attorney and did not indicate that he was unwilling to talk with the officers. After providing a few limited responses, he then made incriminating admissions to

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[5] *Butler*, 441 U.S. at 373.

[6] *Butler*, 441 U.S. at 371.

[7] *Butler*, 441 U.S. at 371.

[8] *Butler*, 441 U.S. at 371.

[9] *Butler*, 441 U.S. at 371.

the police. In these ways, this case is factually like *Butler*.

In response to this comparison between this case and *Butler*, Thompkins cites the notification form used here and contends that the Michigan police were not interested in obtaining a waiver. Resp. Br. 20. This is not true. Detective Helgert expressly testified that "it was necessary for [Thompkins] to waive his rights." J.A. 14a. And regarding the notification form, if anything, the refusal by the accused in *Butler* to sign the waiver at the bottom of the advice of rights form was a more powerful indication that he did not wish to waive his rights than the refusal here by Thompkins who refused to sign a mere notification form. J.A. 13a.

Thompkins, p. 18, and the National Association of Criminal Defense Lawyers (NACDL), p. 23, argue that there was no valid implied waiver here, relying on the statement from *Miranda* that a waiver cannot be inferred from the silence of the accused or from the mere fact that the accused ultimately confesses.[10] This Court in *Butler*, however, clarified (as noted above) that there are circumstances in which an accused's silence when *coupled with other factors* may give rise to an implied waiver.[11] In applying this rule, the lower courts on direct review have found that there are circumstances in which the confession will provide the support for the inference that there was an implied

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[10] *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) ("But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.").

[11] *Butler*, 441 U.S. at 373.

waiver.[12] This includes the federal appellate courts on direct review.[13] The Michigan State courts cannot be objectively unreasonable in concluding the same here – Thompkins's answers to the questions incriminating himself in these circumstances knowing that he did not need to answer served as the basis for his voluntarily waiver.

The government has the burden of demonstrating that the accused "voluntarily, knowingly and intelligently" waived his rights.[14] This inquiry has two facets: (1) "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception"; and (2) "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[15] See U.S. Br. 23. In order to determine whether there is a valid waiver, this Court noted that a court should examine

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[12] *See* 2 W. LaFave, J. Israel, N King & O. Kerr, Criminal Procedure § 6.9(d)(3d 2007), p. 831 ("But what if the defendant expresses an understanding of the *Miranda* warnings he has received and thereafter an incriminating statement is obtained from him? In the language of *Butler*, does this amount to a showing of 'an understanding of his rights and a course of conduct indicating waiver'? Several courts have answered this question in the affirmative.").

[13] *See*, e.g., *United States v. Cardwell*, 433 F.3d 378, 389-390 (4th Cir. 2005) ("Because Hinson had been fully informed and indicated his understanding of his *Miranda* rights, his willingness to answer Agent High's question is as clear an indicia of his implied waiver of his right to remain silent as we can imagine.").

[14] *Miranda*, 384 U.S. at 444, 475-476.

[15] *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

the particular facts and circumstances surrounding the waiver.[16]

The key to the analysis here is that Thompkins was apprised of his rights and knew that he did not have to answer questions and could ask for an attorney at any time. He never invoked his rights, never attempted to stop the interview, and made some responses, verbal and non-verbal, to the police overtures. His decision ultimately to answer Detective Helgert's questions was inconsistent with his exercise of his right to remain silent. J.A. 10a-11a. He knew he did not have to answer these questions but chose to do so anyway. This was his voluntary decision. In doing so, his actions and words indicated that he was waiving his known rights. In the words of *Miranda*, this statement was "the product of his free choice."[17] The Michigan courts were not objectively unreasonable in admitting them.

Thompkins also contends that the Michigan Court of Appeals was objectively unreasonable in relying on a state case, *People v. McReavy*,[18] an invocation case, when the issue presented was whether Thompkins validly waived his right to remain silent. Resp. Br. 24. But the Michigan Court of Appeals also answered the question of invocation because that was the specific claim raised by Thompkins on appeal. Thompkins argued this point in the Michigan Court of Appeals as an invocation claim. See State Brief for Thompkins in the Michigan Court of Appeals, p. 6

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[16] *Butler*, 441 U.S. at 374-375.

[17] *Miranda*, 384 U.S. at 457, 458.

[18] *People v. McReavy*, 436 Mich. 197; 462 N.W.2d 1 (1990).

("[Thompkins] was unequivocally exercising his Fifth Amendment privilege against self-incrimination"). In fact, Thompkins himself cited *McReavy* in his brief, p. 8, to the Michigan Court of Appeals. Thus, the suggestion by Thompkins that the Michigan Court misread the law or his argument is not supported by the record.

The conclusion by the Michigan courts that this was an implied waiver was not objectively unreasonable. This Court has not clearly established there can be no implied waiver when an accused acknowledges his rights, does not invoke them, provides limited responses, and then voluntarily answers questions knowing that he need not.

B. There is no clearly established "immediacy requirement."

In contending that *Butler* does not apply, Thompkins attempts to narrow *Butler* and argues that it contains an "immediacy requirement." See Resp. Br. 19. The amicus on behalf of NACDL similarly contends that any such implied waiver if allowed should be limited to the "initial investigative questions." See NACDL Br. 15. But these standards do not appear in *Butler* and they are not required by *Miranda*. These would be new rules.

As already noted, the law that is relevant for determining what is "clearly established" under 28 U.S.C. § 2254(d) is limited to the holdings of this Court.[19] This Court cannot impose new obligations not

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[19] *Williams*, 529 U.S. at 403-404 (O'Connor, J. for the Court).

clearly established "under the guise of extensions to existing law."[20]

The contention that this Court has restricted the time period in which an implied waiver may occur is not supported by *Butler* or by the decisions of this Court following *Butler*. This Court has not established time parameters on when an accused may impliedly waive his right to remain silent in speaking with the police. The federal appellate courts have generally recognized that a waiver may be implied by voluntarily answering questions after a knowing reception of one's rights under *Miranda*.[21]

In evaluating these cases, Thompkins attempts to distill a principle consistent with one that he advocates that limits the implied waiver to cases in which the waiver occurs "immediate[ly]" following the provision of rights. Resp. Br. 22. But the rule advocated by Thompkins has not been established by this Court.

The only indication of a time limitation regarding a valid waiver may be inferred from *Miranda* itself. This Court indicated that a "lengthy interrogation" before a statement militates against a finding of a valid waiver:

> [T]he fact of lengthy interrogation or incommunicado incarceration before a

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[20] *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004).

[21] *See, e.g., United States v. Velasquez*, 626 F.2d 314, 320 (3rd Cir. 1980); *Cardwell*, 433 F.3d at 389-390 (4th Cir. 2005); *United States v. Nichols*, 512 F.3d 789, 798 (6th Cir. 2008); and *United States v. Washington*, 462 F.3d 1124, 1134 (9th Cir. 2006).

> statement is made is strong evidence that the accused did not validly waive his rights.[22]

The waiver obtained by the police in these circumstances would arise not from a free election of the accused, but from the "compelling influence of the interrogation."[23]

But the interrogation here was not lengthy. The entire interview lasted only two hours and forty-five minutes in the middle of the afternoon. The police advised Thompkins of his rights at 1:30 p.m., and Detective Helgert's police report indicated that the police left at 4:15 p.m. J.A. 15a, 16a. According to Detective Helgert, the police changed their tactic near the end of the interview, which the attorney for Thompkins marked at two hours and fifteen minutes. J.A. 16a-17a, 18a.[24] Thus, the interview lasted two hours and fifteen minutes or two hours and a half before Thompkins impliedly waived his rights by answering a series of questions, culminating in his admission that he prayed to God for forgiveness for "shooting that boy down." J.A. 11a.

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[22] *Miranda*, 384 U.S. at 476.

[23] *Miranda*, 384 U.S. at 476.

[24] Thompkins and NACDL indicate that the interview lasted for "two hours and forty five minutes" or "nearly three hours" before Thompkins incriminated himself. Resp. Br. 25; NACDL Br. 5. These claims are not factually sensitive to the record. Two hours and forty five minutes marks the total interview time. J.A. 16a. Detective Helgert explained that after Thompkins had implicated himself the interview lasted "fifteen (15), twenty (20) minutes more." J.A. 11a.

By comparison to the two hours and fifteen minutes of interrogation before waiver here, this Court in *Frazier v. Cupp* described as a "short duration" an interrogation that began at 5 p.m. and concluded at 6:45 p.m. when examining a confession for voluntariness under *Escobedo v. Illinois*.[25] The durations that this Court has identified as coercive were substantially longer than one hour and forty five minutes in *Frazier* or the two hours and fifteen minutes here. Compare *Michigan v. Mosley* (characterizing as "prolonged interrogation" the interrogation in *Westover v. United States* in which the police arrested the accused at 9:45 p.m. and then interrogated him throughout the night and through the next morning);[26] *Darwin v. Connecticut* (the police kept the accused incommunicado for 30 to 48 hours before his confession);[27] and *Blackburn v. Georgia* (eight or nine hours of interrogation for an accused who was probably "insane and incompetent").[28] See U.S. Br. 30. The law from this Court indicates that the interrogation here was short and did not render any waiver invalid.

C. There is no clearly established prohibition against pre-waiver interrogation.

Both Thompkins and the NACDL amicus indicate that this Court's decision in *Miranda* forbade pre-waiver interrogation. Resp. Br. 42-44; NACDL Br.

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[25] *Frazier v. Cupp*, 394 U.S. 731, 738 (1969), relying on the voluntariness test of *Escobedo v. Illinois*, 378 U.S. 478 (1964).

[26] *Michigan v. Mosley*, 423 U.S. 96, 106 (1975), citing *Westover v. United States*, 384 U.S. 346 (1966) (companion case to *Miranda*).

[27] *Darwin v. Connecticut*, 391 U.S. 346, 349 (1968).

[28] *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960).

8-15. This is wrong. Their contention is not supported by *Miranda*, would require the overruling of this Court's decision in *Butler*, and would contradict the holdings of many federal appellate circuits on direct review. See U.S. Br. 20-21. This Court does not create new rules in habeas to provide a criminal defendant relief.[29]

This Court's decision in *Miranda* itself allows that the police might engage in interrogation after giving the warnings themselves but before the accused had waived his rights. In describing the procedure, this Court indicated that *the warnings themselves* were the essential prerequisite to questioning:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.[30]

This ordering of the process suggests that the questioning may ensue after the knowing reception of the warnings.

This Court further explained that "lengthy interrogation" would be "strong evidence" that there was no valid waiver.[31] This is because the "compelling influence of the interrogation" may "finally" force the

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[29] *See Yarborough*, 541 U.S. at 666.

[30] *Miranda*, 384 U.S. at 473-474.

[31] *Miranda*, 384 U.S. at 476.

accused to waive his rights.[32] This point is cited for a different reason by both Thompkins and the NACDL amicus. See Resp. Br. 18; NACDL Br. 9, 10, 16, 17, 19. But the fact of lengthy interrogation is only relevant where the interrogation *precedes* the waiver, otherwise the interrogation would not have the "compelling influence" that might coerce a waiver.[33] In other words, this presumption against waiver after lengthy interrogation is predicated on the understanding that there was an interrogation *before* the waiver occurred. It assumes pre-waiver interrogation and indicates that if this interrogation is "lengthy," this is strong evidence that the waiver was not voluntary. But if the interrogation were not lengthy, the evidence would not contradict the finding of a knowing waiver. This point is fatal to the claim that *Miranda* forecloses all pre-waiver interrogation.

The NACDL amicus, p. 8, relies on the following statement from *Miranda* for its contention that *Miranda* forecloses pre-waiver interrogation:

> After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained

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[32] *Miranda*, 384 U.S. at 476.

[33] *Miranda*, 384 U.S. at 476.

> as a result of interrogation can be used against him.[34]

But this Court does not state that the waiver must occur before questioning can occur. Rather, this Court is clear that warnings and waiver are prerequisites as a matter of proof at trial for the admission of the statements. As long as the waiver is proven, the statements are admissible.

Moreover, the decision in *Butler* clearly contemplates pre-waiver interrogation. It is significant that in his three pages of analysis on this claim, Thompkins does not cite *Butler* at all. Resp. Br. 42-44. And the brief for NACDL wrongly claims that the analysis from *Butler* is mere obiter dictum. NACDL Br. 13-14. That is a misreading of *Butler*.

The standard identified by this Court in *Butler* is that a waiver can be "inferred from the actions and words of the person *interrogated*."[35] The clear indication is that there are "at least some cases" in which an accused's responses during the interrogation might give rise to the conclusion that he has waived his rights. Even where the accused is silent regarding whether he will waive his rights, the understanding of his rights and course of conduct might indicate waiver.[36] Moreover, the cases cited in *Butler* for the proposition that the lower courts had rejected the

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[34] *Miranda*, 384 U.S. at 479.

[35] *Butler*, 441 U.S. at 373 (emphasis added).

[36] *Butler*, 441 U.S. at 373.

requirement of an express waiver had themselves specifically allowed pre-waiver interrogation.[37]

The contention that this is mere dicta is not well taken. This Court established the standard for the lower court (the North Carolina Supreme Court) to apply on remand. These standards were integral to the Court's analysis where it did not indicate whether the conduct of Butler in the specific case constituted an implied waiver.

Moreover, the federal courts on direct review have recognized that an accused's answers in response to interrogation may themselves serve as the basis for the implied waiver.[38] Examining the actions of the federal courts is useful in evaluating the reasonableness of the State's decision.[39] The State trial court's decision here – that after an express acknowledgement of his rights, not invoking his rights, and participating in a limited way in the interview, that Thompkins's answers to the questions themselves served as the waiver, J.A. 28 – is supported by the decisions of the lower federal courts on direct review. There is no clearly established precedent that indicates that pre-waiver interrogation is improper. To the contrary, as argued above, this Court's jurisprudence in *Miranda* and *Butler* supports it.

The standards urged by Thompkins, eliminating the use of pre-waiver interrogation, would curtail

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[37] *Butler*, 441 U.S. at 376, citing among others, *Blackmon v. Blackledge*, 541 F.2d 1070, 1072 (4th Cir. 1976).

[38] See n. 21 above.

[39] *See Price v. Vincent*, 538 U.S. 634, 643 (2003).

legitimate police practices by effectively requiring the police to obtain an express waiver from the inception of the interview. The suggestion by Thompkins, pp. 20, 27-28, that the police acted improperly here by failing to ask directly whether he was waiving his right to remain silent was rejected in *Butler*.[40] Moreover, the Constitution does not require the police to immediately obtain a waiver. Such a rule would unnecessarily inhibit suspects and the police. See U.S. Br. 18.

There also is nothing in the record to suggest that the Michigan police are trained to attempt to subvert the *Miranda* warnings. Unlike Thompkins's comparison of the conduct in this case to the police conduct in *Missouri v. Seibert*, see Resp. Br. 43, the police did not render the *Miranda* warnings "ineffective."[41] Thompkins knew he could end the interview at any time, but elected not to do so. This Court has repeatedly recognized the value of voluntary confessions in criminal prosecutions.[42]

The use of pre-waiver interrogation is not a distortion of *Miranda* as Thompkins contends. The core value of *Miranda* is to ensure that any statement given

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[40] This is the same point that Justice Brennan advanced in his dissent. *See Butler*, 441 U.S. at 379 (Brennan, J. dissenting).

[41] *Missouri v. Seibert*, 542 U.S. 600, 613 (2004) Souter, J. plurality).

[42] *Burbine*, 475 U.S. at 426 ("Admissions of guilt are more than merely 'desirable,' . . . they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.") (citation omitted). *See also Oregon v. Elstad*, 470 U.S. 298, 312 (1985); *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

is a matter of "free choice."[43] Knowing that he did not need to answer Detective Helgert's questions, Thompkins did so anyway. The fact that Thompkins elected to speak was his free decision.[44]

D. Thompkins was not "oppress[ed]," "badgered," without "power," or "impaired."

Although not found by the Sixth Circuit, Thompkins contends that the incriminating statement that he gave was a product of coercion. Resp. Br. 29. He argued that the interrogation conditions were "oppressive" (p. 30), that Thompkins had "no power to affect his situation" (p. 31), that "his capacity for rational judgment was impaired" (p. 33), and that he was "badgered" for almost three hours before his will was "overborne" (p. 33). These assertions are contradicted by the record. Thompkins's waiver was voluntary. See U.S. Br. 29-30. The fundamental error of this entire line of analysis for Thompkins is predicated on his failure to address the significance of the fact that he expressly acknowledged his rights.

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[43] *Miranda*, 384 U.S. at 457. *See also Connecticut v. Barrett*, 479 U.S. 523, 528 (1987), quoting *Miranda* at 469 ("The fundamental purpose of the Court's decision in *Miranda* was 'to assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process.'").

[44] The amicus brief for NACDL asserts that reiterating the *Butler* rule as understood by the lower courts would "subvert" the settled practices of the police. NACDL Br. 34. As the cases applying the implied-waiver doctrine demonstrate, the practice of pre-waiver interrogation is common. It is the rejection of this practice by limiting the holding in *Butler* – an inappropriate action in habeas review – that would require the police to change their practices.

Detective Helgert testified that he initially established that Thompkins could read English by asking him to read out loud the fifth point on the notification of rights form. J.A. 8a. This right provided basically that "you can exercise your [r]ights at any time" by "[s]top answering questions" or "summon[ing] an attorney." J.A. 146a. Detective Helgert also explained that he read out loud the four rights listed under Miranda, J.A. 8a, and he testified that "I believe I asked him if he understood the Rights, and I think I got a verbal answer to that as a 'yes.'" J.A. 9a. On this point, the Michigan courts specifically found that Thompkins had expressly acknowledged his rights. J.A. 26a; Pet. App. 75a. This factual determination is entitled to deference under AEDPA under 28 U.S.C. § 2254(d)(2) or (e)(1).

The *Miranda* warnings ensured that any participation by Thompkins would be voluntary: "[f]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process."[45] That is the key point.

Once Thompkins knowingly understood his rights, the claim that the next two hours and fifteen minutes of interrogation overcame his will is untenable. Thompkins was not injured or intoxicated. J.A. 23a. The interview occurred during the afternoon. There were no threats or promises, and there was nothing improper about the religious content of the

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[45] *Davis v. United States*, 512 U.S. 452, 460 (1994) (brackets in original and internal quotes omitted), citing *Burbine*, 475 U.S. at 427.

questions. See U.S. Br. 30-31. The interview was not lengthy as noted above. Thompkins had the tools to end the interrogation after he knowingly received his rights.

The suggestion that the implied waiver or confession was involuntary is meritless. The Michigan Court of Appeals was not objectively unreasonable in concluding that his waiver was voluntary.

II. The Michigan Court of Appeals was not objectively unreasonable in rejecting the contention that Thompkins invoked his right to remain silent.

The Michigan Court of Appeals concluded that Thompkins did not impliedly invoke his right to remain silent by his conduct during the interview, but rather determined that he voluntarily waived his right to remain silent. Pet. App. 75a.

In his brief, Thompkins contends that his conduct of largely remaining silent during the interview was an invocation of his right to remain silent. This contention is belied by the record. The State courts did not unreasonably apply clearly established Supreme Court precedent in concluding that Thompkins did not invoke his right to remain silent. This Court's decision in *Davis v. United States* further corroborates this conclusion.

A. Thompkins did not indicate that he wanted to "cut off questioning" – he never indicated that he wished to remain silent.

The inquiry into whether there is a waiver of one's right to remain silent is distinct from the inquiry whether there has been an invocation of that right.[46] This Court in *Miranda* stated that an accused invokes his right to remain silent where he indicates "in any manner, at any time prior to or during questioning, that he wishes to remain silent[.]"[47] This is the

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[46] *Smith v. Illinois*, 469 U.S. 91, 98 (1984).

[47] *Miranda*, 384 U.S. at 473-474.

accused's right to "cut off questioning."[48] As noted by the lower courts, however, this Court has not delineated the standard by which the courts are to determine whether ambiguous conduct is sufficient to constitute an invocation of an accused's right to remain silent.[49] Therefore, there is no clearly established law on this point. See U.S. Brief 14-15.

Thompkins contends that by his manner during the interview he "unequivocally" indicated that he wished to remain silent. Resp. Br. 16-18, 27-28. But this contention was contradicted by the State court findings and the factual record.

Although Thompkins remained largely verbally silent during the interview, J.A. 19a, he did participate in the interview before his confession:

> Q. And, you said there were times that he responded, correct?
>
> A. Yes.
>
> Q. And, his response for what, to engage you in conversation, or simply say something to the effect that 'I'm not talking to you.'
>
> A. Never 'I'm not talking to you.' Sometimes it would be eye-contact, sometimes it would be a nod of the head, sometimes, I know the

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[48] *Miranda*, 384 U.S. at 474.

[49] *See*, e.g., *Bui v. DiPaulo*, 170 F.3d 232, 239-240 (1st Cir. 1999) (examining the application of *Davis* to an equivocal assertion of a right to remain silent in habeas).

words, 'I don't know.' was quite prevalent. [J.A. 21a.]

* * *

Q. You said you got both verbal and non-verbal [responses]?

A. Yes.

Q. What do you mean by non-verbal?

A. Sometimes it would be a word or two. A 'yeah', or a 'no', or 'I don't know.'

Sometimes a nod of the head. And sometimes because he looked – he simply sat down like I'm sitting (indicating) with my head in my hands looking down. Sometimes it was just something he would look up and make eye-contact would be the only response.

Q. Okay.

Did you take these non-verbal responses to be also to be engaging in a conversation?

A. *Well, as limited as it was, yeah, that's what he was doing.* [J.A. 23a-24a (emphasis added).]

From this record, the Michigan Court of Appeals determined that Thompkins continued to communicate with the officer "albeit sporadically" during the interview. Pet. App. 75a. Thompkins has failed to

demonstrate this was "an unreasonable determination of the facts in light of the evidence" under 28 U.S.C. § 2254(d)(2) or that it was rebutted by "clear and convincing evidence" under 28 U.S.C. § 2254(e)(1).

Significantly, Detective Helgert also testified that Thompkins never indicated that he wished to remain silent:

> Q. Did he ever indicate to you, sir, that he wanted Counsel?
>
> A. No.
>
> *Q. Did he ever indicate to you that he was unwilling to talk to you?*
>
> *A. No.*
>
> Q. Did he ever indicate to you, sir, that he was invoking any of this [sic, these] Rights?
>
> A. No. [J.A. 10a (emphasis added).]

The determination that Thompkins did not invoke his right to remain silent was not unreasonable in light of these facts. Thompkins did not testify and did not dispute Detective Helgert's testimony.

Like the Sixth Circuit, Thompkins predicates his argument on the claim that he remained *entirely* silent before he implicated himself. Resp. Br. 28 ("not talking for almost three hours").[50] The amicus brief contends

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[50] The Sixth Circuit wrongly indicated that Thompkins "was silent for two hours and forty-five minutes." *Thompkins v. Berghuis*, 547 F.3d 572, 586 (6th Cir. 2008).

the same. NACDL Br. 5 ("nearly three hours straight spent questioning a silent Thompkins"). These arguments disregard the factual findings of the Michigan courts on Thompkins's conduct. The record is clear that Thompkins did not remain completely silent. He provided some limited responses as noted above. J.A. 21a, 23a-24a. The contention advanced by NACDL that the responses he gave were not in response to substantive questions is also not supported by the record. NACDL Br. 5. Detective Helgert did not state that Thompkins gave his short answers to questions that were unrelated to the murder investigation.

Thompkins also suggests that he did not have an opportunity to invoke his rights. Resp. Br. 33. *Miranda* requires that the accused have an opportunity to exercise his rights throughout the interrogation.[51] But the record is clear that Thompkins had an opportunity to invoke his rights throughout the interview. The police did not restrict his ability to speak at all.

In brief, there was no clear indication that Thompkins wanted to "cut off questioning."[52] In fact, Detective Helgert provided the only testimony at the hearing and characterized the interview as a "limited" conversation. J.A. 24a. There is a fundamental difference between (1) refusing to answer all questions and remaining absolutely silent and (2) participating in a limited way in a conversation with police. The fact that Thompkins participated in only a limited fashion does not mean that he refused to participate at all. It was a conversation, albeit a largely one-sided one, in

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[51] *Miranda*, 384 U.S. at 479.

[52] *Miranda*, 384 U.S. at 474.

which Thompkins's participation was voluntary. J.A. 21a, 23a-24a. There is no clearly established Supreme Court precedent that this kind of conduct constitutes an implied invocation of an accused's right to remain silent. The Michigan courts were not objectively unreasonable.

B. The rule in *Davis v. United States* if applied to the right to remain silent would corroborate the conclusion that Thompkins did not invoke his rights.

Regarding an accused's right to counsel, this Court in *Davis v. United States* made clear that an accused must "unambiguously request counsel" before the police must cease asking questions during a custodial interrogation.[53] The inquiry is an objective one.[54] This Court has not addressed the point whether this rule would also apply to the invocation of an accused's right to remain silent.

Thompkins contends that the *Davis* rule is predicated on a "two-stage interrogation" analysis in which the waiver has already been obtained and the issue is whether the accused is asking to assert a right that has been waived. Resp. Br. 34-41. Although that was the factual posture of the case in *Davis*, the decisions in *Miranda* and *Butler* allow pre-waiver interrogation.

The holding of *Davis* applies the *Miranda* rules in the post-waiver circumstance, but there is nothing in the logic of the rule that would limit its application

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[53] *Davis*, 512 U.S. at 459.

[54] *Davis*, 512 U.S. at 459.

to the circumstance where there has not already been an express waiver of that right. The knowing reception of the rights under *Miranda* "dispel[s] whatever coercion is inherent in the interrogation process."[55] The provision of the *Miranda* warnings to the accused equips him to make a determination whether to answer questions or stop the questioning regardless whether the accused then expressly waives these rights.

In requiring that the invocation of the right to counsel be unequivocal under *Miranda*, this Court explained in *Davis* that this rule is based on the countervailing need for effective law enforcement:

> [I]t is police officers who must actually decide whether or not they can question a suspect. . . . [I]f we were to require questioning to cease if a suspect makes a statement that might be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong.[56]

This point applies with equal force for equivocal assertions of the right to remain silent regardless whether there has been an express waiver. The police will be forced to guess whether there has been an

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[55] *Davis*, 512 U.S. at 460, citing *Burbine*, 475 U.S. at 427.

[56] *Davis*, 512 U.S. at 461.

invocation of the right to remain silent in the absence of a clear statement. See U.S. Br. 13-17.

Of course, here Thompkins did not even equivocally assert his right to remain silent. He never indicated that he wanted the questions to stop, and he participated in a limited way in the interview even if he did remain largely silent. J.A. 10a, 21a, 23a-24a.

The contention of Thompkins that a "reasonable police officer" would have known that Thompkins had unequivocally invoked his right to remain silent is contradicted by the record. Resp. Br. 28. Thompkins never indicated that he was unwilling to talk. J.A. 10a. Detective Helgert explained that Thompkins was communicating with him in a limited way. J.A. 23a-24a. Insofar as Thompkins provided some responses, but declined the opportunity to give his version of events, this is consistent with the rule of *Miranda* applied by the lower courts that the refusal to answer some questions but not others does not constitute an invocation.[57] That was the basis on which the Michigan Court of Appeals rejected Thompkins's invocation claim.[58] This conclusion was not an unreasonable application of clearly established Supreme Court precedent.

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[57] *See*, e.g., *Bruni v. Lewis*, 847 F.2d 561, 564 (9th Cir. 1988) (the accused "effected a selective waiver by indicating an agreement to answer some questions but not others."). *See also Connecticut v. Barrett*, 479 U.S. at 528 (recognizing "limited invocation").

[58] "When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of a right to remain silent." Pet. App. 75a, citing *McReavy*, 436 Mich. at 222; 462 N.W.2d at 12. (internal quotes omitted).

III. With respect to the *Strickland* claim, there was no prejudice here because the fact of Purifoy's acquittal did not benefit the prosecution, and the addition of a jury instruction regarding the use of Purifoy's acquittal would have had no impact on the weighty evidence of Thompkins's guilt.

Thompkins was not prejudiced by his counsel's failure to request a jury instruction limiting consideration of Eric Purifoy's acquittal to assess his credibility. The absence of the instruction did not allow the jury to find Thompkins guilty by process of elimination, as he argues in his brief, because a presumptively-reasonable jury that followed its other instructions could not have deduced Thompkins's guilt from the fact that Purifoy was acquitted of aiding him. Moreover, the inclusion of such an instruction would not have diminished the overwhelming evidence that led the jury to convict Thompkins.

A. There was no process of elimination that led the jury to find Thompkins guilty.

Thompkins asserts that the jury deduced his guilt from Purifoy's acquittal. In his words: "If one of the two people sitting in the front seat was acquitted of the crime, that would only leave the other person as the shooter." Resp. Br. 58. The equivocation between "crime" and "shooter" in this sentence reveals the flaw in his argument. Purifoy was not acquitted of being the "shooter." He was acquitted of the crime on the theory that he aided Thompkins. J.A. 99a, 139a-141a, 177a. The prosecution contended at both trials that Thompkins was the shooter and Purifoy aided him.

Had Purifoy been found guilty under that theory, Thompkins's jury would have known that another jury had been convinced beyond a reasonable doubt of the theory that was being offered to it. In that circumstance, the jury could have concluded that Purifoy's conviction supported Thompkins's conviction. But Purifoy was acquitted. The acquittal was not relevant to Thompkins's theory of innocence. If anything, the acquittal undercut the prosecution's theory, which is why in its closing argument the prosecution stated: "you are not bound by what [Purifoy's] jury found." J.A. 202a.[59]

The possibility that the jury found Thompkins guilty by process of elimination despite the illogic of doing so is not the sort of prejudice that can support a claim under *Strickland*. *Strickland* requires a reviewing court to assume that the fact-finder will follow its instructions and act reasonably.[60] Thompkins's jury was instructed that it was the sole fact-finder and was instructed to acquit unless Thompkins's guilt was proved beyond a reasonable doubt. J.A. 207a-209a, 228a. The jury would have had to ignore these instructions to give weight to Purifoy's jury's decision. It would have had to act unreasonably to deduce Thompkins's guilt as a shooter from Purifoy's

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[59] There is no *legal* distinction under Michigan law between principals and aiders and abettors. MICH. COMP. LAWS 767.39. But this does not affect the analysis. The elimination of the distinction simply allows the prosecution to charge a suspect under a single statute, and it subjects a person to the same penalty no matter his role in the crime. The *factual* distinction, and the logical consequences that follow from it, remain.

[60] *Strickland v. Washington*, 466 U.S. 668, 694-695 (1984).

acquittal as an aider. The one does not follow from the other.

B. The inclusion of a limiting jury instruction would not have altered the outcome of the trial.

Purifoy's acquittal did not lead to Thompkins's conviction – the evidence of his guilt did. A limiting instruction regarding the permissible use of Purifoy's acquittal would only have served to protect against a jury that disregarded its other instructions and disregarded the theories of the parties. In other words, it would not have affected the jury's proper deliberations. Under *Strickland*, the question is whether the addition of the limiting instruction would have created a reasonable probability that the jury would have acquitted.[61] It would not have here.

The addition of the limiting instruction would not have diminished the powerful evidence proving Thompkins's guilt. It would have had no bearing on the jury's decision to believe Frederick France's identification of Thompkins as the shooter, which was strongly supported by the videotape evidence. It would have had no bearing on Thompkins's confession to Omar Stephens, the details of which were corroborated by other evidence. And it would have had no bearing on the evidence that Thompkins fled the State and changed his identity, whereas Purifoy turned himself in to the police. There is no reasonable probability that the addition of this limiting jury instruction would have changed the outcome of this one-sided trial.

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[61] *Strickland*, 466 U.S. at 695-696.

CONCLUSION

For these reasons, the State of Michigan asks this Court to reverse the decision of the Sixth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

MARY BERGHUIS, WARDEN, PETITIONER

v.

VAN CHESTER THOMPKINS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether respondent's voluntary statements—obtained in response to questioning after a police officer informed respondent of his *Miranda* rights, respondent stated that he understood those rights, and respondent neither expressly invoked nor expressly waived his rights—may be admitted against him consistent with his Fifth Amendment privilege against compelled self-incrimination.

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INTEREST OF THE UNITED STATES

This case presents issues concerning the application of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), including whether a suspect must unambiguously invoke the right to remain silent in order to preclude police questioning; whether the police may question a suspect who has been informed of his *Miranda* rights, has stated that he understood his rights, and has not invoked or waived those rights; and whether a suspect who is aware of his rights waives them when he knowingly, intelligently, and voluntarily responds to police questioning. Although the case arises on federal habeas review of a state conviction under 28 U.S.C. 2254, the Court's view of the underlying *Miranda* questions has substantial implications for federal criminal investigations and trials. Accordingly, the

United States has a significant federal interest in the case.

STATEMENT

1. On January 10, 2000, a shooting occurred outside a strip mall in Southfield, Michigan. Pet. App. 3a. The two victims, Frederick France and Samuel Morris, were driving around the mall when several men on foot, including respondent, stopped in front of their car and began staring them down. *Ibid.* France and Morris had words with respondent, then drove away. *Ibid.* A few minutes later, respondent and his crew pulled up in a van next to France and Morris, so that the passenger side of the van (where respondent sat) was aligned with the driver's side of the car (where Morris sat). *Ibid.* Respondent said to France and Morris, "What you say, Big Dog?," and then pulled out a gun and fired several shots at them. *Ibid.*; J.A. 72a-73a. Morris died from multiple gunshot wounds; France was injured but eventually recovered. Pet. App. 74a-75a.

Respondent fled and was apprehended about a year later in Ohio. Pet. App. 4a. Two Southfield police officers traveled to Ohio to interview respondent while he was being held pending extradition. *Id.* at 4a-5a; J.A. 7a-8a. The interview began at approximately 1:30 p.m. and lasted between two and one-half and three hours. J.A. 8a, 10a, 12a, 18a.[1] Respondent was not sick, injured, or intoxicated during the interview, J.A. 23a, and the police never threatened him, J.A. 158a.

Detective Christopher Helgert began the interview by presenting respondent with an advice of rights form. Pet. App. 5a; J.A. 8a-9a, 12a. The form stated the *Miranda* warnings, followed by the question, "Do you

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[1] The interview was not recorded. J.A. 160a.

understand each of these rights that I have explained to you?" Pet. Br. 60 (attachment); see J.A. 146a-147a. Detective Helgert asked respondent to read one of the warnings out loud in order to ensure that respondent understood English; respondent did. J.A. 8a-9a, 12a, 147a-148a. Detective Helgert then read all of the warnings to respondent and asked him to sign the form to evidence his understanding of his rights; respondent declined to do so. J.A. 9a, 12a-14a. Detective Helgert "asked [respondent] if he understood the Rights," and respondent answered "Yes." J.A. 9a.[2]

During the interview, respondent never said that he did not want to talk with the police or that he wanted an attorney. J.A. 10a, 19a, 21a-22a, 148a-149a. He mostly listened as the two officers talked to him. J.A. 10a. Although Detective Helgert described the interview as "very, very one-sided," *ibid.*, he stated that respondent occasionally shared "limited verbal responses" with the officers—such as "Yes," "No," or "I don't know"—and communicated nonverbally by making eye contact and nodding his head, J.A. 9a-10a, 21a, 23a-24a.

The officers told respondent that they had information about the murder and that they wanted to hear his side of the story, because there are two sides to every story. J.A. 10a, 13a-14a, 16a. Detective Helgert also suggested that respondent provide information to help

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[2] Detective Helgert's statements to that effect came at the suppression hearing. J.A. 9a. At trial, Detective Helgert could not recall specifically asking respondent whether he understood his rights. J.A. 148a ("I don't know that I orally asked him that question."). The Michigan Court of Appeals, however, stated that respondent had "verbally acknowledged that he understood [his] rights," Pet App. 75a, the court of appeals accepted that finding, Pet. App. 5a, and respondent has not challenged it.

himself. J.A. 21a, 150a. Respondent listened but did not have "any significant response" to those suggestions. J.A. 150a.

Finally, Detective Helgert tried "a spiritual tac[k]." J.A. 11a-12a; see Pet. App. 6a. He asked respondent whether he believed in God. J.A. 11. Respondent made eye contact with Detective Helgert, said "Yes," and his eyes "well[ed] up with tears." *Ibid.* Detective Helgert asked respondent whether he prayed to God, and respondent said, "Yes." *Ibid.* Detective Helgert then asked respondent, "Do you pray to God to forgive you for shooting that boy down?" J.A. 153a; see J.A. 11a. Respondent answered "Yes" and looked down. J.A. 11a, 153a. Respondent declined to write anything down, and the interview ended shortly thereafter. J.A. 11a.

2. Respondent was charged with first-degree murder, assault with intent to commit murder, and several firearms-related offenses. Compl. 1-4. He moved to suppress his statements, arguing that he had implicitly invoked his right to silence and that his statements were involuntary. J.A. 26a-27a. The trial court denied the motion. J.A. 25a-28a. The court determined that respondent never invoked his *Miranda* rights, J.A. 26a, and that he knowingly, intelligently, and voluntarily waived those rights, J.A. 27a-28a. The court observed that respondent stated that he understood his rights, occasionally "participated in the interview," and then answered a series of questions regarding his belief in God. J.A. 28a. The court also observed that respondent "was not injured, intoxicated or ill," "subjected * * * to threatened or actual physical abuse," "deprived * * * of food or medical attention," or questioned for an impermissibly long time. J.A. 27a-28a.

The jury found respondent guilty on all counts, and the court sentenced him to imprisonment for life. Pet. App. 74a.

3. The Michigan Court of Appeals affirmed. Pet. App. 74a-82a. The court rejected respondent's arguments that he "'implicitly' invoked his right to remain silent by failing to answer the officers' questions" and that his statements were coerced. *Id.* at 75a. The court noted that respondent "never said he did not want to talk or that he was not going to say anything" and in fact "he continued to talk with the officer[s], albeit sporadically." *Ibid.* The court also observed that respondent "verbally acknowledged that he understood [the *Miranda*] rights" and "voluntarily waived his right to remain silent." *Ibid.*

The Michigan Supreme Court denied discretionary review. Pet. App. 73a.

4. Respondent filed a federal habeas petition, Pet. App. 83a-91a, which the district court denied, *id.* at 39a-72a. As relevant here, the court rejected respondent's arguments that he had invoked his right to remain silent and that his statements were the result of police coercion. *Id.* at 66a-69a. Citing *Davis* v. *United States*, 512 U.S. 452 (1994), the court determined that an invocation of the right to silence, like an invocation of the right to counsel, must be unequivocal. Pet. App. 67a. The court explained that there was no such invocation here, because respondent never told the officers that he wanted an attorney or that he did not want to talk with them, and because respondent occasionally participated in the interview. *Id.* at 67a-68a. The court also determined that neither the length of the interview nor Detective Helgert's appeal to respondent's religious beliefs rendered his statements involuntary. *Id.* at 68a-69a.

5. The court of appeals reversed. Pet. App. 1a-37a. The court considered two distinct Fifth Amendment inquiries: whether respondent invoked his right to counsel (so that interrogation must cease) and whether he validly waived his right to counsel (so that any statements obtained from him would be admissible at his trial). *Id.* at 18a-19a. The court expressly declined to address the invocation issue. *Id.* at 20a n.4, 29a.

On the waiver issue, the court stated that the government has a "heavy burden * * * to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination." Pet. App. 16a-17a (quoting *Miranda*, 384 U.S. at 475). The court observed that a waiver need not be express; it can be "inferred from the actions and words of the person interrogated." *Id.* at 17a (quoting *North Carolina* v. *Butler*, 441 U.S. 369, 373 & n.4 (1979)). But, the court noted, a waiver may not "be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Ibid.* (quoting *Miranda*, 384 U.S. at 475).

Here, the court of appeals held, the state court unreasonably determined the facts and unreasonably applied clearly established federal law in finding an implied waiver. Pet. App. 29a. In the court's view, respondent's "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: [respondent] did not wish to waive his rights." *Ibid.*

SUMMARY OF ARGUMENT

Respondent validly waived his Fifth Amendment privilege against compelled self-incrimination when he

answered police questions after receiving and understanding his *Miranda* rights. Respondent listened to police questions for a time, without either invoking or waiving his rights, but he ultimately decided to speak. That course of conduct evidenced a knowing, intelligent, and voluntary waiver of his *Miranda* rights, and his statements were therefore admissible in the State's case in chief.

The Fifth Amendment analysis in this case consists of three inquiries: whether respondent invoked his Fifth Amendment rights after receiving the *Miranda* warnings; whether the police permissibly interrogated respondent after he stated that he understood his rights but he neither invoked nor waived them; and whether respondent validly waived his rights when he made incriminating statements to the police.

A. Respondent did not invoke his Fifth Amendment rights because he did not communicate clearly that he wished to exercise his right to "cut off questioning." *Michigan* v. *Mosley*, 423 U.S. 96, 100 (1975) (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 474 (1966)). In *Davis* v. *United States*, 512 U.S. 452 (1994), this Court held that, once a suspect has been informed of his right to counsel, the suspect must invoke that right unambiguously. The inquiry under *Davis* is whether a reasonable police officer in the circumstances would understand that the suspect requested counsel. An ambiguous request does not require the police to cease questioning, the Court held, because such a rule would interfere with effective law enforcement without providing any necessary protection to Fifth Amendment rights.

Although *Davis* addressed the *Miranda* right to counsel, its requirement of an "unambiguous or unequivocal" invocation, 512 U.S. at 462, should apply to the

right to silence as well. Requiring an objectively clear assertion of a suspect's "right to cut off questioning," *Mosley*, 423 U.S. at 103, respects the suspect's rights while providing clear guidance to the police and permitting legitimate law enforcement activity. And, although *Davis* applied its unequivocal-invocation standard after an initial waiver of Fifth Amendment rights, the *Davis* standard should apply to initial invocations as well.

In this case, respondent did not clearly invoke his right "to terminate questioning." *Mosley*, 423 U.S. at 103. Respondent never stated that he did not want to talk with the police. Nor did he attempt to end the interview. Respondent suggests that he implicitly invoked his right to silence by remaining silent much of the time. But a suspect may silently listen to questions for some period without unambiguously invoking his right to terminate questioning. In any event, even during the time in which he did not answer questions seeking his account of the crime, respondent did occasionally participate in the interview. Under the circumstances, respondent did not invoke his right to silence.

B. If, after receiving and understanding the warnings, a suspect neither invokes nor waives his rights under *Miranda*, officers may engage in non-coercive questioning and efforts to persuade the suspect to speak. *Miranda* requires the police to provide a suspect in custody with certain warnings in order to dispel the coercion inherent in custodial interrogation. When a suspect has received the *Miranda* warnings and has an opportunity to exercise his rights, the suspect has received the protections envisioned in *Miranda*, and the police may question him.

The police are not required to obtain a waiver of a suspect's rights before engaging in questioning. Such a

rule would penalize legitimate police investigations with no concomitant Fifth Amendment benefit, and it would be inconsistent with this Court's holding that a waiver may be inferred from conduct and speech during interrogation. See *North Carolina* v. *Butler*, 441 U.S. 369 (1979). Here, the police provided respondent with complete *Miranda* warnings, respondent said he understood his rights, and respondent did not immediately either invoke or waive those rights. The police therefore could question respondent consistent with the Fifth Amendment.

C. If a suspect knows and understands his *Miranda* rights, and makes statements to the police free of coercion, that is sufficient to demonstrate a waiver of the suspect's rights. A waiver of *Miranda* rights must be knowing, intelligent, and voluntary. The government need not prove that the suspect expressly waived his rights; under *Butler*, a waiver may be inferred from the totality of the circumstances. When a suspect receives the *Miranda* warnings and evidences his understanding of his rights, then his subsequent statements are knowing and intelligent. When the government shows that the suspect's statements were not coerced, then the statements are voluntary. In holding that respondent did not waive his rights, the court of appeals incorrectly focused on respondent's conduct before making his statements, rather than asking whether his later decision to answer questions was knowing, intelligent, and voluntary.

Respondent validly waived his *Miranda* rights here. Respondent read a portion of the *Miranda* warnings out loud, then told the officers that he understood the warnings. He controlled when he would participate in the interview, and he ultimately decided to answer a series

of questions in response to the officers' appeal to his conscience and religious beliefs. Nothing suggests that police coercion led him to speak. Respondent's statements therefore were properly admitted in the State's case in chief at trial.

ARGUMENT

RESPONDENT VALIDLY WAIVED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Amendment provides that "[n]o person shall * * * be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Under this Court's decision in *Miranda*, a suspect in custodial interrogation must be informed of his rights, but he may voluntarily choose to waive them. In this case, the officers gave respondent his *Miranda* warnings, obtained his assurance that he understood the warnings, and then proceeded to question him. For much of the interview, respondent was silent, but when the police appealed to his religious beliefs, respondent answered a series of questions. Those answers were properly admitted in the State's case in chief at respondent's murder trial.

The admissibility of respondent's statements under *Miranda* depends upon three inquiries: whether respondent invoked his Fifth Amendment right to silence; whether the police could question respondent after he was advised of his rights, stated that he understood them, and neither invoked nor waived them; and whether respondent ultimately waived his Fifth Amendment rights.[3] In this case, respondent never invoked his right

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[3] The court of appeals expressly addressed the third issue (waiver). Pet. App. 22a-29a. Although the court of appeals declined to address the first issue (invocation), *id.* at 20a n.4, 29a, the issue appears to be before the Court, because respondent has raised the issue as an alter-

to silence; the police permissibly questioned him about the crimes at issue; and respondent ultimately waived his rights when he made incriminating statements.

A. An Invocation Of The Fifth Amendment Right To Silence Must Be Unequivocal

1. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court applied the Fifth Amendment privilege against self-incrimination in the context of custodial interrogation. The Court held that, in order to "dispel the compulsion inherent in custodial" interrogation, certain warnings must be given "at the outset of the interrogation." *Id.* at 457-458. Those warnings advise the suspect that he has the right to remain silent, that any statements he makes can be used against him in court, that he has the right to consult with counsel, and that if he cannot afford an attorney, one will be provided for him prior to questioning. *Id.* at 479. If the police fail to provide the *Miranda* warnings or a fully effective equivalent, any statements obtained from the suspect are inadmissible in the government's case in chief. *Dickerson* v. *United States*, 530 U.S. 428, 443-444 (2000).

A suspect who receives *Miranda* warnings may then choose to waive or invoke his rights. Invocation has significant consequences for the course of the interrogation. If the suspect invokes his right to "cut off questioning," the police must "scrupulously honor[]" that right to silence by ceasing interrogation. *Michigan* v. *Mosley*,

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native ground for affirmance, Br. in Opp. 7-13. The court of appeals also did not expressly address the second issue (interrogation), but that question is bound up in the first and third questions, because what the police can do when a suspect neither invokes nor waives his rights depends upon what is necessary for an invocation and for a waiver. See Pet. 9-15.

423 U.S. 96, 103-104 (1975) (quoting *Miranda*, 384 U.S. at 474, 479). The police may later re-approach the suspect, provide him with fresh warnings, and attempt to persuade him to cooperate. *Id.* at 104-107 (noting lapse of time and other circumstances). If the suspect invokes his right to counsel, then the police must cease questioning him until counsel has been made available to him, unless he initiates further contact with the police. *Edwards* v. *Arizona*, 451 U.S. 477, 484-485 (1981); see also *Maryland* v. *Shatzer*, No. 08-680 (argued Oct. 5, 2009) (considering possible circumstances in which *Edwards* protection lapses).

2. In *Davis* v. *United States*, 512 U.S. 452 (1994), this Court addressed what a suspect must do to invoke the right to counsel. There, the police provided the suspect with *Miranda* warnings, and he initially waived his rights to silence and to counsel. *Id.* at 454-455. One and one-half hours later, the suspect remarked, "Maybe I should talk to a lawyer." *Id.* at 455. The Court concluded that the statement was insufficient to invoke the right to counsel. *Id.* at 458.

The Court held that, in order to invoke his right to counsel, a suspect must "unambiguously" request counsel—that is, "he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 459. If a suspect makes a statement "that is ambiguous or equivocal," the police are not required to cease questioning him. *Ibid.* Nor are the police required to ask questions to clarify an ambiguous reference to counsel, although it will often be "good police practice" to do so. *Id.* at 461-462.

An "objective inquiry" is required, the Court explained, to "avoid difficulties of proof and to provide guidance to officers conducting investigations." *Davis*, 512 U.S. at 458-459. And, the Court determined, an unambiguous invocation standard best balances the Fifth Amendment interest in protecting against official compulsion and society's interest in uncovering and prosecuting criminal activity. *Id.* at 459-460. A rule that would require police officers to cease questioning a suspect when they "do not know whether or not the suspect wants a lawyer * * * 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.'" *Id.* at 460 (quoting *Mosley*, 423 U.S. at 102).

3. Although *Davis* involved a suspect's post-waiver invocation of the right to counsel, the rule it announced should apply to any potential invocation of *Miranda* rights.

a. The *Davis* rule should apply to the right to remain silent and "terminate questioning," *Mosley*, 423 U.S. at 103, just as it applies to the right to counsel. Both rights protect the Fifth Amendment's privilege against compulsory self-incrimination. *Miranda*, 384 U.S. at 467-473. The Court's rationale for requiring that an invocation of the right to counsel be unambiguous applies equally to the right to silence. In both instances, clear rules "avoid difficulties of proof and * * * provide guidance to officers" on how to proceed in the face of ambiguity. *Davis*, 512 U.S. at 458-459.

An unambiguous-invocation requirement for the right to remain silent and terminate questioning strikes the appropriate balance between protecting the suspect's rights and permitting valuable police investigation. As this Court has noted, "the primary protection

afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S. at 460. The Constitution requires that the police respect a suspect's choice to remain silent once that choice has been made, *Miranda*, 384 U.S. at 473-474, but it does not require that the police interpret ambiguous statements as invocations of *Miranda* rights. Although treating an ambiguous statement as an invocation of rights "might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation," *Moran* v. *Burbine*, 475 U.S. 412, 425 (1986), it would in some instances make the suspect's choice for him, rather than ensuring the *suspect's* "right to choose between silence and speech," *Miranda*, 384 U.S. at 469.

Treating an ambiguous remark as an invocation would also place a heavy burden on law enforcement, by requiring officers "to make difficult judgment calls" about a suspect's poorly expressed intentions and then suffer the consequence of suppression "if they guess[ed] wrong." *Davis*, 512 U.S. at 461. The suppression of a voluntary confession in these circumstances would exact a substantial and unjustified societal price. *Burbine*, 475 U.S. at 427; see *United States* v. *Washington*, 431 U.S. 181, 187 (1977) ("[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers * * * are inherently desirable.").

Respondent argues (Br. in Opp. 11) that "the assertion of the right to remain silent need not be as unequivocal as is required for the assertion of the right to counsel," because the *Miranda* Court stated that questioning must cease "[i]f the individual indicates in any manner * * * that he wishes to remain silent." 384 U.S. at 473-474. But *Miranda* did not purport to address how to interpret an ambiguous statement about either counsel

or silence. *Miranda* indicated that a suspect need not use particular words to invoke his right to remain silent and "cut off questioning," *id.* at 473; the Court said he may do so "in any manner." *Id.* at 473-474. But the Court did not address the level of clarity required in the suspect's statement. Indeed, the *Miranda* Court also used the "in any manner" language with respect to the right to counsel, *id.* at 444-445, 473-474, yet *Davis* considered the standard for invocation of counsel an open question, 512 U.S. at 456. To the extent that the *Miranda* Court considered the question of invocation at issue here, the Court suggested that the police need not stop questioning in the face of an "indecisive" suspect. *Id.* at 485. Consistent with that suggestion, this Court should hold that the *Davis* standard applies to invocations of the right to remain silent.[4]

b. *Davis* does not support a distinction between a defendant who initially waived his *Miranda* rights and then reconsidered (the facts in *Davis*) and a suspect who is considering in the first instance whether to invoke his rights following warnings (the facts in this case). *Davis* states a general rule: a request for counsel must be unambiguous, so that a reasonable police officer can recog-

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[4] Every court of appeals to squarely consider the issue has applied the *Davis* rule to the right to remain silent. See *United States* v. *Nelson*, 450 F.3d 1201, 1211-1212 (10th Cir.), cert. denied, 549 U.S. 937 (2006); *United States* v. *Acosta*, 363 F.3d 1141, 1152 (11th Cir. 2004); *United States* v. *Hurst*, 228 F.3d 751, 759-760 (6th Cir. 2000); *United States* v. *Banks*, 78 F.3d 1190, 1197-1198 (7th Cir.), rev'd on other grounds, 519 U.S. 990 (1996); *Medina* v. *Singletary*, 59 F.3d 1095, 1100-1101 (11th Cir. 1995), cert. denied, 517 U.S. 1247 (1996); *United States* v. *Johnson*, 56 F.3d 947, 955 (8th Cir. 1995). See also *United States* v. *Ramirez*, 79 F.3d 298, 305 (2d Cir.) (assuming that *Davis* applies to invocations of the right to remain silent), cert. denied, 519 U.S. 850 (1996).

nize it as an invocation of *Miranda* rights and respect the suspect's wishes. *Davis*, 512 U.S. at 459. That reasoning applies equally to both initial and post-waiver invocations of *Miranda* rights. Presuming that the suspect has requested counsel when he has made an ambiguous invocation—whether it is an initial invocation or a post-waiver invocation—would "needlessly prevent the police from questioning a suspect * * * even if the suspect did not wish to" exercise his rights. *Id.* at 460.

Initial and post-waiver invocations are governed by the same rule for sound reasons. A suspect's *Miranda* rights do not vary based on whether the suspect has previously waived those rights. The suspect can choose to stop speaking at any time; likewise, officers must cease questioning whenever a proper invocation occurs. *Miranda*, 384 U.S. at 473-474. As Justice Souter explained in his opinion concurring in the judgment in *Davis*, "*Miranda* itself discredited" any distinction between initial and post-waiver invocations, by explaining that warnings ensure "a continuous opportunity to exercise" Fifth Amendment rights. *Davis*, 512 U.S. at 470-471 (quoting *Miranda*, 384 U.S. at 444).

Adopting different standards for initial and post-waiver invocations would create uncertainties in an area in which the Court has stressed the need for clear "guidance to police officers conducting interrogations." *Davis*, 512 U.S. at 458-459. Police officers conducting custodial interrogations then would have to determine whether a prior waiver had occurred even before assessing whether a suspect is now invoking his rights—all with the threat of suppression looming "if they guess

wrong." *Id.* at 461. The *Davis* unambiguous-invocation standard therefore should apply to both contexts.[5]

4. In this case, respondent did not clearly or unequivocally invoke his right "to cut off questioning." *Miranda*, 384 U.S. at 474. Officer Helgert began the interview by providing respondent with complete *Miranda* rights, and respondent stated that he understood them. J.A. 9a. But "[h]e never indicated to [the officer] that he was going to exercise his Right to Remain Silent." J.A. 19a. Respondent "never" said "I'm not talking to you" or "I am not saying anything" or "I don't want to talk to you." J.A. 21a-22a (internal quotation marks omitted); see J.A. 148a-149a. Respondent did not state any "unwillingness to cooperate with th[e] conversation"—only an "unwillingness * * * to sign anything." J.A. 14a. That unwillingness to sign alone does not demonstrate that respondent wished to invoke his right to silence. See *North Carolina* v. *Butler*, 441 U.S. 369, 371 (1979). Because respondent did not affirmatively indicate that he wished to terminate question-

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[5] The majority of courts of appeals have assumed that the *Davis* standard applies to both initial and post-waiver invocations of *Miranda* rights. See *United States* v. *Lee*, 413 F.3d 622, 626 (7th Cir. 2005); *United States* v. *Johnson*, 400 F.3d 187, 194-195 (4th Cir.), cert. denied, 546 U.S. 856 (2005); *United States* v. *Syslo*, 303 F.3d 860, 866 (8th Cir. 2002) (per curiam); *United States* v. *Suarez*, 263 F.3d 468, 482-483 (6th Cir. 2001), cert. denied, 535 U.S. 991 (2002); *United States* v. *Brown*, 287 F.3d 965, 972-973 (10th Cir. 2002); *Hurst*, 228 F.3d at 759-760; *United States* v. *Posada-Rios*, 158 F.3d 832, 867 (5th Cir. 1998), cert. denied, 526 U.S. 1031 (1999); *Grant-Chase* v. *Commissioner, N.H. Dep't of Corr.*, 145 F.3d 431, 436 & n.5 (1st Cir.), cert. denied, 525 U.S. 941 (1998). Two courts of appeals have limited the *Davis* rule to post-waiver invocations. See *United States* v. *Plugh*, 576 F.3d 135, 142-143 (2d Cir. 2009); *United States* v. *Rodriguez*, 518 F.3d 1072, 1078-1080 (9th Cir. 2008).

ing, let alone unambiguously invoke his rights, the state court correctly concluded (Pet. App. 75a) that he had not invoked his right to silence.

Respondent contends (Br. in Opp. 7, 9-10) that he invoked his rights simply by remaining silent. But this case does not present the question of whether a suspect who remains mute invokes his right to silence in a way that requires the police to cease questioning, because respondent did not remain mute in the face of police questioning. Rather, he "continued to talk" with the officers, albeit "sporadically," J.A. 9a; see J.A. 21a, 23a-24a, and Detective Helgert "understood" him to be "engaging in conversation" though his limited verbal and non-verbal responses, J.A. 26a.

In any event, respondent's contention lacks merit. Although the right of silence, in contrast to the right to counsel, can be exercised passively (by not speaking), a suspect's initial reticence does not inherently convey to a reasonable police officer that the suspect wishes to exercise a right to silence and terminate the interview. A suspect may want to listen to a recitation of the evidence against him or learn about the benefits of cooperation before deciding whether to exercise his rights. Or a suspect may be formulating an explanation of events that lessens his culpability, planning an alibi, or thinking through his options. Or he may be willing to talk about some topics but not others. *E.g.*, *Commonwealth* v. *Sicari*, 752 N.E.2d 684, 695-696 (Mass. 2001) (silent suspect was "redevelop[ing] his strategy and decid[ing] how he wished to respond to the discovery of" incriminating evidence), cert. denied, 534 U.S. 1142 (2002). Simply presuming an invocation after some initial period of silence, as respondent suggests (Br. in Opp. 9-10), would override the wishes of those suspects who wanted to

listen and deliberate further, rather than to end questioning. It would also create an impossible situation for the police, who would have no clear guidelines on their conduct when a suspect initially says nothing but appears receptive to listening. Thus, even if a defendant remains silent after hearing the warnings, that *alone* would not convey an unambiguous message requiring the police to cease questioning him.[6]

B. The Police May Interrogate A Suspect Who Has Received *Miranda* Warnings And Has Neither Invoked Nor Waived His Fifth Amendment Rights

1. After a suspect receives his *Miranda* warnings, he may invoke them, thereby ending the interview, see *Mosley*, *supra*, or he may waive them and make statements to the police. But he also may take no action to invoke or waive his rights, instead waiting to see how the interview unfolds. In those circumstances, the police may conduct interrogation—*i.e.*, may make statements

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[6] Suspects routinely affirmatively and unambiguously invoke their right to silence. See, *e.g.*, *United States* v. *DeMarce*, 564 F.3d 989, 994 (8th Cir. 2009) (defendant said "You know, I don't want to talk to you. I'm not going to sign anything" and left room); *Anderson* v. *Terhune*, 516 F.3d 781, 789 (9th Cir.) (en banc) ("I plead the Fifth."), cert. denied, 129 S. Ct. 344 (2008); *State* v. *Day*, 619 N.W.2d 745, 749 (Minn. 2000) ("Said I don't want to tell you guys anything to say about me in court."). Of course, a suspect's silence in response to questions over a protracted period coupled with body language and demeanor could communicate to a reasonable police officer the suspect's intention to cut off questioning. Cf. *Davis*, 512 U.S. at 459 (framing the relevant question as whether "a reasonable police officer in the circumstances would understand" the suspect to be invoking his rights). But when, as in this case, a suspect participates in some fashion in interchange with the officers, and the officers reasonably understand him to be engaged (even if sporadically) in conversation, the suspect's failure to answer questions is at best ambiguous and does not amount to an invocation.

reasonably likely to elicit an incriminating response. *Rhode Island* v. *Innes*, 446 U.S. 291, 301-302 (1980).

The *Miranda* warnings are provided "[p]rior to any questioning" in order to dispel the coercion inherent in custodial interrogation. 384 U.S. at 444. As the Court has explained, "[T]he primary protection afforded suspects subject[ed] to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S. at 460. The recitation of the warnings "make[s] the[] [suspect] aware" of the privilege against self-incrimination and "show[s] the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it," thereby ensuring that any resulting statements are "the product of [the suspect's] free choice." *Miranda*, 384 U.S. at 458, 468.

Once a suspect has been provided with the requisite warnings and has had an opportunity to invoke his rights, the primary purposes of *Miranda* are fulfilled. This Court has described "a person's right to cut off questioning" as "[t]he critical safeguard" provided by the *Miranda* warnings, *Mosley*, 423 U.S. at 103 (internal quotation marks omitted). After a suspect learns of that right and does not invoke it, the police may proceed to question him.

2. The police need not obtain a waiver of rights from the suspect before questioning him. If the suspect makes a statement during custodial interrogation and the government wishes to introduce it at trial, the government must "demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, 384 U.S. at 474-475. But that does not mean that the police must obtain a waiver before asking any questions. Only the warnings are "an abso-

lute prerequisite to interrogation," *id.* at 471; the warnings plus a waiver are "prerequisites to the admissibility of any statement made by a defendant," *id.* at 476.

Requiring the police to obtain a waiver before any questioning would substantially hinder criminal investigations, with no substantial Fifth Amendment benefit. A suspect may be willing to talk with police once he learns of the evidence against him or of the benefits of cooperation, yet police officers who were unable to obtain an immediate waiver would be hesitant to advise the suspect of those facts, for fear that doing so would be deemed impermissible interrogation. Such a rule would curtail potentially fruitful interaction before it could begin, and would force the suspect to make an immediate, even if premature, choice as to how to proceed, rather than allowing him an "unfettered" "right to choose between silence and speech * * * *throughout* the interrogation process." *Miranda*, 384 U.S. at 469 (emphasis added).

A rule demanding pre-interrogation waiver also would be inconsistent with the Court's implied waiver doctrine. As explained *infra* (pp. 23-24), a waiver of *Miranda* rights may be established either through the suspect's express statement or through evidence of the defendant's "understanding of his rights and a course of conduct indicating waiver." *Butler*, 441 U.S. at 373. In the latter instance, waiver is "inferred from the actions and words of the person interrogated." *Ibid.* That explanation assumes that the police may lawfully interrogate a suspect who has not yet waived his rights. See p. 24, *infra*.

3. In *Davis*, the Court stated that "[i]f the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to

question him." 512 U.S. at 458; see *id.* at 461. But that statement simply reflects the facts of *Davis*—in which the suspect initially waived his rights, *id.* at 455—and does not indicate that the police necessarily must obtain a waiver before questioning a suspect. Similarly, in *Missouri* v. *Seibert*, 542 U.S. 600 (2004), the plurality remarked in passing that the "failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." *Id.* at 608 (plurality opinion). But *Seibert* did not involve a question of waiver after proper warnings, because in that case prior, unwarned questioning rendered the warnings themselves ineffective. *Id.* at 611-614 (plurality opinion); *id.* at 618-622 (Kennedy, J., concurring in the judgment) (requiring curative measures after deliberate two-step interrogation strategy). And the context makes clear that the plurality was describing prerequisites for the admission of the suspect's statements into evidence, not prerequisites for interrogation itself. *Id.* at 608-609 & n.1 (plurality opinion).

4. In this case, after the police provided respondent with *Miranda* warnings, he took no steps to invoke his rights to silence and to counsel. See pp. 17-19, *supra*. At the same time, he did not immediately "indicate * * * that he would be willing to waive his Rights." J.A. 9a. Instead, respondent "sat there and listened" as the police advised him of the evidence they had gathered and attempted to persuade him to tell his side of the story. J.A. 22a; see J.A. 10a, 13a-14a, 16a, 21a, 150a. That police conduct, which the courts below assumed

constituted "interrogation," J.A. 26a-27a; Pet. App. 23a, 67a, 75a, was permissible.[7]

C. A Suspect Who Has Received *Miranda* Warnings, Evidenced An Understanding Of His Rights, And Made Uncoerced Statements To The Police Has Validly Waived His Rights

1. If a suspect makes a statement during custodial interrogation, the burden is on the government to show, as a "prerequisite[] to the admissibility of [the] statement," that the defendant "voluntarily, knowingly and intelligently" waived his rights. *Miranda*, 384 U.S. at 444, 475-476. The waiver inquiry "has two distinct dimensions": "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Burbine*, 475 U.S. at 421. Whether a suspect has waived his rights "must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Butler*, 441 U.S. at 374-375 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). The government has the burden to establish waiver by a preponderance of the evidence. *Colorado* v. *Connelly*, 479 U.S. 157, 168 (1986).

The Court has made clear, however, that a suspect need not expressly waive his *Miranda* rights. In *North*

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[7] The court of appeals apparently agreed, because it suggested that a waiver could have been found if respondent answered more of the officers' questions (Pet. App. 2a), thus assuming that it was proper for the police to ask those questions.

Carolina v. *Butler*, 441 U.S. 369 (1979), the Court explained that "in at least some cases" waiver may be "inferred from the actions and words of the person interrogated." *Id.* at 373. There, the police advised a suspect of his *Miranda* rights, and he indicated that he understood them, but refused to sign a waiver form. *Id.* at 371. The suspect stated, however, that he would talk to the agents, and he made inculpatory statements. *Ibid.* At no time did the suspect request counsel or attempt to stop the interview. *Ibid.* The Court held, contrary to the state supreme court, that a waiver can be implied rather than express, and remanded the case for application of that standard. *Id.* at 374-376.

Butler explained that, while an express written or oral waiver of the rights is "usually strong proof of the validity of that wavier," it is "not inevitably either necessary or sufficient to establish waiver." 441 U.S. at 373. The question "is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived [*Miranda*] rights." *Ibid.* The Court emphasized that while a defendant's silence following receipt of the *Miranda* warnings is not alone sufficient to establish a waiver, "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver" may "support a conclusion that a defendant has waived his rights." *Ibid.* That reasoning echoed the statement in *Miranda* that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." 384 U.S. at 475.

2. The court of appeals held that respondent did not waive his right to remain silent because his "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story"

demonstrated that he "did not wish to waive his rights." Pet. App. 29a. The court of appeals erred by focusing its waiver analysis on respondent's failure to respond substantively during prior questioning instead of on respondent's answers to Detective Helgert's questions appealing to his conscience and belief in God. The relevant question is whether respondent knowingly, intelligently, and voluntarily waived his rights when he answered three of Detective Helgert's questions with incriminating responses. *Butler*, 441 U.S. at 373. The answer depends on whether respondent understood his rights, *Burbine*, 475 U.S. at 421; whether respondent was subject to police coercion that had the effect of overcoming his free will, *ibid.*; and whether respondent's answers to Detective Helgert's questions about God show a course of conduct from which "waiver can be clearly inferred," *Butler*, 441 U.S. at 373. Neither respondent's failure to give an express waiver nor his non-responsiveness in a prior period prevented him from validly waiving his right to silence by choosing to speak.

The court of appeals apparently focused on respondent's period of near-silence because of this Court's statement that waiver should not be presumed from a silent record. Pet. App. 26a-27a. But the *Miranda* Court's statement (384 U.S. 475, echoed in *Butler*, 441 U.S. at 373) that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given" means simply that there must be some conduct or statements of the suspect from which a court can infer a waiver; *Miranda* hardly prevents a suspect who initially was silent from later deciding to speak. If the suspect does so, his statements are admissible so long as the government shows, directly or circumstantially, that

he waived his rights in making those subsequent statements.

The court also erred in rejecting the finding of waiver here because of the principle that waiver will not be presumed simply because "a confession was in fact eventually obtained." Pet. App. 25a (quoting *Miranda*, 384 U.S. at 475). If the record reflects only that the police gave the suspect his *Miranda* rights and that he confessed—without any evidence of the suspect's understanding of his rights or of an absence of police coercion—the prosecution would be hard-pressed to demonstrate a knowing, intelligent, and voluntary waiver. But waiver can be established when the suspect evidences his understanding of his *Miranda* rights and voluntarily makes a statement. A statement made with an understanding of the *Miranda* rights is knowing and intelligent, and if made freely, rather than as the product of impermissible police coercion, then the statement is voluntary. Under those circumstances, the suspect has validly waived his *Miranda* rights. *E.g.*, *Burbine*, 475 U.S. at 421 (waiver may be found when the "totality of the circumstances" show "both an uncoerced choice and the requisite level of comprehension").

The court of appeals suggested that the State is required to show something more than knowing, intelligent, and voluntary statements. The court cited a variety of cases in which suspects made spontaneous statements or spoke freely with the police "as part of a 'steady stream' of speech or as part of a back-and-forth conversation" and the courts found waivers. Pet. App. 27a-28a (quoting *Bui* v. *DiPaola*, 170 F.3d 232, 239-240 (1st Cir. 1999), cert. denied, 529 U.S. 1086 (2000)). While such extended give-and-take indeed indicates the suspect's willingness to waive his rights, that level of

interchange is not necessary to find waiver. The Fifth Amendment does not require that a suspect's waiver of constitutional rights be swift or enthusiastic. What it requires is that the suspect speak with an understanding of his rights and free of police coercion. If he does, the suspect's incriminating answers, even if not immediate, manifest a waiver. See, *e.g.*, *United States* v. *Cardwell*, 433 F.3d 378, 389-390 (4th Cir. 2005), cert. denied, 547 U.S. 1061 (2006).

3. In this case, respondent validly waived his *Miranda* rights when he answered three questions appealing to his conscience through his religious beliefs.

a. Respondent's answers to Detective Helgert's questions about his belief in God evidenced his decision to speak with the officers. Once the police provided *Miranda* warnings, respondent had the power to terminate questioning simply by saying that he did not wish to speak or by requesting an attorney. But he did not do so, instead listening to the officers' questions and sporadically answering them. J.A. 9a, 21a, 23a-24a. Although respondent did not respond substantively to the officers' suggestions that he help himself by telling his side of the story, J.A. 10a, 13a-14a, 150a, he was moved when Officer Helgert appealed to his religious beliefs, J.A. 11a. He became engaged in the interview, his demeanor changed, and he answered a series of three questions. J.A. 10a-11a, 153a. Those answers reflect his choice to speak.

b. Respondent's decision to speak was knowing and intelligent. At the outset of the interview, Detective Helgert provided respondent with complete *Miranda* warnings, orally and in writing, which advised him that he had a right to the assistance of counsel in connection with the interrogation; that counsel would be provided

for him if he could not afford one; that he had a right to remain silent and that anything he said could be used in evidence against him; and that he could decide to exercise those rights at any time. J.A. 8a-9a; Pet. Br. 60 (attachment). That information was sufficient to inform respondent of the nature of the *Miranda* rights and the consequences of failing to exercise those rights. See, *e.g.*, *Patterson* v. *Illinois*, 487 U.S. 285, 293 (1988) (a suspect "who is told he has such rights * * * is in a curious posture to later complain that his waiver of these rights was unknowing" (internal quotation marks omitted)).

Of course, a *Miranda* waiver will not be effective if the suspect fails to comprehend the information contained in the warnings. But here, Detective Helgert took steps to document that respondent actually understood his rights. He asked respondent to read a portion of the *Miranda* warnings out loud, in order to ensure that respondent read and understood English. J.A. 9a. Further, Detective Helgert "advised [respondent] of his Miranda rights" and respondent "verbally acknowledged that he understood th[em]." Pet. App. 75a; see J.A. 9a.[8] At the time of the interview, respondent was an adult, was not intoxicated, and had no trouble communicating with the police. J.A. 23a; see J.A. 148a (respondent was

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[8] The court of appeals accepted the factual finding that respondent said he understood his rights, Pet. App. 5a, based on Detective Helgert's testimony to that effect at the suppression hearing, J.A. 9a, even though Detective Helgert testified at trial that he did not think he asked respondent to confirm his understanding, J.A. 148a. Respondent also has accepted this factual finding. See Br. in Opp. 7. Even if there is conflicting evidence on this point, the state court could have reasonably adopted the statement closer in time to the interrogation. See 28 U.S.C. 2254(d)(2).

"literate" and "coherent"). Respondent's ultimate choice to respond to the officers therefore was knowing and intelligent. Respondent has not contended otherwise.

c. Respondent's decision to speak also was made voluntarily. A waiver is voluntary when "it [i]s the product of a free and deliberate choice." *Burbine*, 475 U.S. at 421. Only if a suspect's "will [was] overborne and his capacity for self-determination critically impaired because of coercive police conduct" will his waiver of *Miranda* rights be involuntary. *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987) (internal quotation marks omitted). Here, the circumstances of the interview confirm that respondent chose to speak voluntarily. The interview was conducted in a standard-size room, in the early afternoon. J.A. 12a, 18a, 144a-145a. Respondent was not injured, infirm, or intoxicated. J.A. 23a. The police never threatened respondent. J.A. 158a.

The police did not aggressively and relentlessly question respondent. Instead, they told him that "this was his opportunity to explain his side" of the story and advised him that he would be better off if he cooperated. J.A. 10a, 16a-17a, 150a; see J.A. 17a ("It wasn't so much as a question and wait for an answer * * * [W]e were mostly making statements about, 'This is your chance to tell' [in] kind of a monologue expressing that theme."). Although the officers told respondent of the evidence against him and advised him that cooperation would be in his best interests, neither tactic was the type of coercive conduct that would overbear respondent's will. *E.g.*, *Fare* v. *Michael C.*, 442 U.S. 707, 727 (1979) ("indicat[ing] that a cooperative attitude would be to respondent's benefit" was "far from threatening or coercive"); *United States* v. *Bezanson-Perkins*, 390 F.3d 34, 42 (1st

Cir. 2004) (presenting suspect with the evidence of guilt did not render his waiver involuntary).

The length of the interview is not alone enough to render respondent's statements involuntary. The three-hour time period is similar to those the courts of appeals have found acceptable,[9] and does not begin to approach the lengthy interrogations that this Court has disapproved.[10] Further, the length of the interview was reasonable in light of respondent's occasional communication with the officers. The police did not use any physical force against respondent, threaten him, utilize harsh interrogation practices, or ignore any of his physical needs.

Respondent has contended (Pet. App. 68a) that the police impermissibly coerced him by appealing to his religious beliefs. That is incorrect. "The Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" *Connelly*, 479 U.S. at 170 (quoting *Oregon* v. *Elstad*, 470 U.S. 298, 305 (1985)). Accordingly, the courts of appeals have routinely concluded that an appeal to religious beliefs ordinarily does not render a suspect's statements involuntary. *E.g.*,

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[9] *E.g.*, *Diaz* v. *Senkowski*, 76 F.3d 61, 62, 65 (2d Cir. 1996) (four hours); *Jenner* v. *Smith*, 982 F.2d 329, 331-334 (8th Cir.) (six or seven hours), cert. denied, 510 U.S. 822 (1993); *United States* v. *Guarno*, 819 F.2d 28, 30-31 (2d Cir. 1987) (two and one-half hours).

[10] *E.g.*, *Greenwald* v. *Wisconsin*, 390 U.S. 519, 520-521 (1968) (suspect interrogated for over 18 hours and deprived of food or sleep); *Davis* v. *North Carolina*, 384 U.S. 737, 742-752 (1966) (defendant held incommunicado and interrogated for 16 days); *Culombe* v. *Connecticut*, 367 U.S. 568, 631-635 (1961) (defendant questioned repeatedly over period of five days); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 153-154 (1944) (defendant questioned for 36 hours and deprived of sleep).

United States v. *Miller*, 984 F.2d 1028, 1031-1032 (9th Cir.), cert. denied, 510 U.S. 894 (1993); *Muniz* v. *Johnson*, 132 F.3d 214, 219 (5th Cir.), cert. denied, 523 U.S. 1113 (1998); *Barrera* v. *Young*, 794 F.2d 1264, 1270-1271 (7th Cir. 1986); cf. *Brewer* v. *Williams*, 430 U.S. 387, 392-393 (1977) ("Christian burial" speech). Here, respondent's decision to speak resulted from his religious faith and his anguish over his "shooting that boy down," Pet. App. 6a, rather than any coercive conduct on the part of the officers. The police did not overbear respondent's will.

In short, the totality of the circumstances demonstrate that respondent's decision to respond to Detective Helgert's appeals to his religious beliefs was a knowing, intelligent, and voluntary choice. Respondent's statements therefore were properly admitted in the government's case in chief at his trial.

CONCLUSION

The judgment of the court of appeals should be reversed on the first question presented.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

MARY BERGHUIS,

Petitioner,

vs.

VAN CHESTER THOMPKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Whether the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them.

II. Whether the Court of Appeals failed to afford the State court the deference it was entitled to under 28 U. S. C. § 2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkins' guilt allowed the State court to reasonably reject the claim.

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IN THE

Supreme Court of the United States

MARY BERGHUIS,

Petitioner,

vs.

VAN CHESTER THOMPKINS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the state court's resolution of an issue where this Court has established a general rule,

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

but given little concrete guidance—when a waiver of *Miranda* rights may be inferred from the words and actions of an arrestee who neither expressly waives nor expressly invokes his rights. The resolution of such an issue is necessarily a "judgment call" on the part of the court. Such issues very often do not have a clearly right or clearly wrong answer.

For issues such as this, Congress decided that the state court decision should stand, and the question should not be relitigated on federal habeas. The Sixth Circuit conducted what amounts to *de novo* review in this case, paying only lip service to the AEDPA standard. Such decisions, all too common 13 years after AEDPA, are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In January 2000, Van Chester Thompkins and three to four other men encountered Samuel Morris and Frederick France outside of a deli in Southfield, Michigan. App. to Pet. for Cert. 42a. Thompkins and his friends followed Morris and France in their car, eventually pulling up beside the two men and opening fire on the driver's side of Morris's vehicle. *Id.*, at 43a. Morris was killed and France was injured. *Id.*, at 42a-43a.

After his arrest, Thompkins was initially interrogated by Southfield Police Detective Christopher Helgert and his partner. *Id.*, at 46a. According to Helgert's testimony at the suppression hearing, Thompkins was read his *Miranda* warnings and refused to sign the advice of rights form, J. A. 8a-9a, but never requested an attorney or indicated that he did not wish to speak to the officers. J. A. 10a. The interview continued for two hours and forty-five minutes, with Thompkins giving limited responses to questions. Detective

Helgert testified that Thompkins responded by saying "yeah," "no," or "I don't know," and by making eye contact, nodding his head, and looking up at officers during the interview. J. A. 21a-23a.

Toward the end of the interview, Detective Helgert asked Thompkins if he prayed to God. J. A. 11a. When Thompkins answered affirmatively, Detective Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" *Ibid.* Helgert testified that Thompkins said "yes" and immediately looked down. *Ibid.* The interview ended shortly thereafter. *Ibid.*

Thompkins moved to suppress his statements. The trial court denied the motion with a written opinion and order. J. A. 25a-28a. The court noted, "The detective understood that the defendant was engaging in conversation when he made nonverbal communication." J. A. 26a. After noting the absence of any indication of coercion, see J. A. 27a-28a, the trial court concluded:

> "Here, the evidence showed that the detectives read the defendant his rights, and that he responded that he understood them. The defendant never invoked his right to remain silent, and participated in the interview by making eye contact, nodding, and answering questions with, 'I don't know'. Defendant then answered the two questions at issue. Defendant knowingly and intelligently waived his rights." J. A. 28a.

Thompkins was convicted of first-degree murder, assault with the intent to commit murder, and several firearm offenses. App. to Pet. for Cert. 39a-40a. He appealed to the Michigan Court of Appeals. That court rejected his claim that his *Miranda* rights had been violated. *Id.*, at 75a-76a. The Michigan Court of Appeals did not find grounds to infer that Thompkins' conduct invoked his right to remain silent, and held

that the trial court "did not clearly err in concluding that the defendant voluntarily waived his right to remain silent and that he did not subsequently invoke his right to silence." *Id.*, at 75a. The court also found that defense counsel's failure to request certain jury instructions was not prejudicial, without addressing whether that failure constituted deficient performance. See *id.*, at 80a. The Michigan Supreme Court denied discretionary review. *Id.*, at 73a.

Thompkins filed a petition for a writ of habeas corpus in federal court. The district court denied the petition, but granted a certificate of appealability. *Id.*, at 40a. The Sixth Circuit found the Michigan Court of Appeals decision to be "based on an unreasonable determination of the facts in light of the evidence" presented and "an unreasonable application of clearly established Federal law." *Id.*, at 29a. The Sixth Circuit also found Thompkins' counsel ineffective because he had failed to request a jury instruction. *Id.*, at 33a-37a.

This Court granted certiorari on September 30, 2009.

SUMMARY OF ARGUMENT

The state courts in this case reasonably determined the facts. The conclusion that Thompkins "continued to talk with the officer, albeit sporadically," is reasonable when one considers that speech and silence for the purpose of *Miranda* v. *Arizona* are not confined to the literal meaning of those words. Nonverbal communication is speech and not silence for this purpose.

The state appellate court reasonably decided the argument presented to it. While the Sixth Circuit is correct that invocation and waiver are distinct inquiries, the appellant's argument on direct appeal focused

on invocation. No argument of any substance on implied waiver was made to the state court. A reasonable decision of the question as the appellant chose to present it is all that is required for 28 U. S. C. § 2254(d) to preclude collateral attack on the judgment.

The decisions of the state trial and appellate courts are not contrary to the clearly established federal law as set forth in this Court's precedents. The trial court found implied waiver under all the circumstances, consistently with the rule of law established in *Butler* v. *North Carolina* and *Tague* v. *Louisiana*. Neither of these cases is "materially indistinguishable" from the present case.

The state court decisions are not an unreasonable application of the law to the facts. Given the breadth of the governing rule and the fact-intensive nature of the inquiry, *Yarborough* v. *Alvarado* requires broad deference to the state court decision. On a *de novo* review, reasonable judges could decide the implied waiver issue either way on these facts. Under AEDPA, the state court resolution must stand.

On the ineffective assistance issue, the Sixth Circuit committed the same error as in *Woodford* v. *Visciotti* when it pounced on a single sentence rather than reading the state court's discussion fairly as a whole. The state court correctly mentioned the lack of any prosecutor argument urging the jury toward a forbidden inference from the accomplice's conviction. This is a legitimate factor in deciding the likelihood of prejudice from the jury instructions, as this Court has recognized in closely analogous contexts. Taken as a whole, the state court opinion applied the correct standard, reasonably found no prejudice, and declined to make a holding on performance, as *Strickland* v. *Washington* expressly permits.

ARGUMENT

I. The state court reasonably determined the facts.

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress enacted 28 U. S. C. § 2254(d). This subsection is a modified rule of res judicata, forbidding relitigation of previously rejected claims, subject to two exceptions. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 946 (1998); 141 Cong. Rec. 15,058, cols. 1-2 (1995) (statement of Sen. Biden); Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Kelly*, No. 07-1223, pp. 9-13. The second exception is for "a decision that was based on an unreasonable determination of the facts . . . ." 28 U. S. C. § 2254(d)(2). The Sixth Circuit held that this exception applies to the present case. See *Thompkins* v. *Berghuis*, 547 F. 3d 572, 584-585 (2008). Specifically, that court found fault with the state court's "finding that Thompkins 'continued to talk with the officer, albeit sporadically.' " *Ibid.*

First, it is important to note that this case involves no dispute about the facts at the most basic level. The evidence on the *Miranda* question consisted of the testimony of a single witness, the investigating officer. There is no dispute that during the two hours and 45 minutes Thompkins was " '*[l]argely* silent,' " *id.*, at 585-586, n. 5 (quoting testimony, emphasis added), but also engaging in nonverbal communication such as nodding in response to questions.

Findings of facts are not limited to basic "what happened" facts, though. They can include conclusions and inferences. See *Thompson* v. *Keohane*, 516 U. S. 99, 111 (1995) (noting competency to stand trial and juror bias as factual determinations under former

§ 2254(d)). The characterization of Thompkins' communication with the officer falls easily within the category of factual determinations.

Second, the assessment of communications should consider verbal and nonverbal communications as equivalent. For the purpose of *Miranda*'s "right to remain silent," there is no difference between nodding one's head and speaking the word "yes." The officer's testimony that Thompkins was largely silent in the literal sense does not necessarily mean he was not communicating.

Third, the Sixth Circuit's repeated assertions that the officer did not identify the specific statements Thompkins made or the specific questions to which he responded, 547 F. 3d, at 585-587, does not negate the reasonableness of a finding that he did communicate sporadically. Those communications may be entitled to less weight in the step of applying the law to the facts because of the lack of specificity, but the state court's finding that Thompkins did communicate sporadically throughout the interview is well within the bounds of reasonableness. The second exception to 28 U. S. C. § 2254(d) does not apply to this case.

II. The state court reasonably (and correctly) rejected the argument made to it, which was different from the Sixth Circuit's theory.

This case presents once again the Puzzle of the Morphing Claim. The pattern is by now familiar. In the state court, the defendant presents certain evidence and makes a certain legal argument. The state court rejects the argument made on the evidence presented, and its decision is correct or at least within the bounds of reasonable disagreement. On federal habeas corpus, either the habeas petitioner or the court *sua sponte*

creates a variation on the theme. The claim still comes under the same broad heading, such as a *Miranda* claim or an ineffective assistance claim, but the precise question is different from the one asked and answered in the state court.

Last term in *Bell* v. *Kelly*, No. 07-1223, petitioner claimed that his "significant new evidence" introduced for the first time in federal court had "transform[ed]" his claim into a new one so that 28 U. S. C. § 2254(d) did not apply. See Brief for Petitioner in *Bell* v. *Kelly* 26-27. *Amicus* CJLF argued that the state court decision was entitled to deference if it reasonably decided the claim on the evidence before it. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Kelly* 4-23, http://www.cjlf.org/briefs/BellE.pdf. That question remains unanswered, however, because the Court dismissed the writ of certiorari as improvidently granted. See *Bell* v. *Kelly*, 555 U. S. __, 129 S. Ct. 393, 172 L. Ed. 2d 353 (2008).

Discussing the *Miranda* claims in the present case, the Sixth Circuit noted, "the Supreme Court has cautioned that '[i]nvocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.' *Smith* v. *Illinois*, 469 U. S. 91, 98 (1984)." *Thompkins* v. *Berghuis*, 547 F. 3d 572, 582 (2008). That is correct, but what the Sixth Circuit failed to grasp is that Thompkins, not the Michigan Court of Appeals, chose to state the case as one of invocation of *Miranda* rights as distinguished from failure of the state to establish waiver.

On state direct appeal, Thompkins' *Miranda* discussion consisted of only 4 pages of a 47-page argument. This brief ("Direct Appeal Brief") is available on CJLF's Web site at http://www.cjlf.org/files/ThompkinsStateBrief.pdf. The argument is nearly identical to pages 6-9 of the Brief in Opposition filed in this Court. Thomp-

kins insisted that the police continued to question him after he *invoked* his right to remain silent. He sought to distinguish *Michigan* v. *Mosley*, 423 U. S. 96 (1975), a case that only becomes relevant once there has been an affirmative invocation. See Direct Appeal Brief 7-8. Thompkins also cited three state cases, none of which is an implied waiver case raising the distinct issue later discovered by the Sixth Circuit. *People* v. *Catey*, 135 Mich. App. 714, 719, 723, 356 N. W. 2d 241, 243, 245 (1984), involved an express waiver following an ambiguous statement that defendant claimed was an invocation. *People* v. *Slocum*, 219 Mich. App. 695, 697, 558 N. W. 2d 4, 5 (1996), involved a reinitiation of questioning following an express invocation. *People* v. *McReavy*, 436 Mich. 197, 205, 462 N. W. 2d 1, 4 (1990), involved inferences from selective silence following an express waiver.

Waiver, as distinct from invocation, is barely mentioned in the brief. At page 8, the Direct Appeal Brief says, "the detective admitted that the appellant never indicated that he was willing to waive his rights." That cannot be considered a substantial argument. None of the cases discussing implied waiver, see *infra*, at 15; Brief for Petitioner 26-27, n. 21, are even mentioned, much less distinguished.

The state appellate court considered and reasonably decided the argument that was made to it. That argument was based on a contention that Thompkins had invoked his right to remain silent, not an argument on the insufficiency of a case of implied waiver. Courts may reach out and raise *sua sponte* an argument an

appellant does not make, but they have no obligation to do so as a general rule.[2]

A decision that reasonably applies clearly established law to the argument the appellant makes is all that Congress has required to preclude a grant of federal habeas relief. See 28 U. S. C. § 2254(d). There is no exception for a distinct inquiry under the same claim on which the appellant made no substantial argument.

III. The state court's conclusion on the *Miranda* issue was not contrary to the law clearly established by this Court's precedent.

The state trial court in this case found implied waiver from the totality of the circumstances. See *supra*, at 3. The state appellate court concluded, "The trial court did not clearly err in concluding that defendant voluntarily waived his right to remain silent . . . ." App. to Pet. for Cert. 75a. For the reasons discussed in Part II, *supra*, there is no discussion in the appellate opinion of why the facts support a finding of implied waiver, as distinct from invocation. Discussion is not required, however. The standard of 28 U. S. C. § 2254(d) applies to all state court dispositions on the merits of the claim, even those made in summary dispositions with no opinion at all. *Muth* v. *Frank*, 412 F. 3d 808, 815 (CA7 2005), collects numerous circuit cases on this point and notes that it is implicit in *Weeks* v. *Angelone*, 528 U. S. 225, 237 (2000).

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2. In some states, particularly in capital cases, appellate courts may be required to review certain issues regardless of whether the appellant raises them. See, *e.g.*, *Commonwealth* v. *Kindler*, 536 Pa. 228, 234, n. 3, 639 A. 2d 1, 4, n. 3 (1994). No such issue is present in this case.

Although the state court's reasonable (and correct) disposition of the argument made to it is sufficient to reverse the decision of the Sixth Circuit, if this Court does proceed further, then the first question is whether the finding of waiver is contrary to any of this Court's precedents.

Miranda v. *Arizona*, 384 U. S. 436 (1966), established the acceptable limits of government conduct and similarly defined the scope of court review. When the government fails to satisfy its "heavy burden" of demonstrating knowing and voluntary waiver, *Miranda* prevents the statement from being used against the defendant. *Id.*, at 475. The onus therefore rests on the government to "demonstrate[] the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.*, at 444. Once safeguards have been established, a court must decide on a case-by-case basis whether the defendant waived or invoked his right to silence. *Ibid.* In many cases, *Miranda*'s guidelines make this an easy question to answer, but, as the disagreements among courts in the present case illustrates, resolution of the issue is sometimes not so simple.

The sole purpose of the *Miranda* warnings is to protect against coercion. "The *Miranda* warnings protect this [Fifth Amendment] privilege by ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time. The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him." *Colorado* v. *Spring*, 479 U. S. 564, 574 (1987). It is not the job of the prosecution to convince the court that it was wise

for the defendant to waive the right. See *id.*, at 577. It must only convince the court that police conducted themselves according to *Miranda*'s rules and that any waiver and statement were not compelled. Once this is done, a trial court may conclude that the prosecution has met its "heavy burden."

How exactly the prosecution satisfies this burden may be determined on a case-by-case basis. The two Supreme Court cases that have addressed implied waiver have provided limited guidance for assessing Thompkins' claim. Neither of the two cases is "materially indistinguishable" from the present case. Cf. *Williams* v. *Taylor*, 529 U. S. 362, 405 (2000).

North Carolina v. *Butler*, 441 U. S. 369, 371 (1979), examined whether a defendant had waived his right to counsel when he stated, "I will talk to you but I'm not signing any form." In examining whether his conduct could be interpreted as a waiver of his Sixth Amendment right, this Court noted that *Miranda* "held that an express statement can constitute a waiver, and that silence alone after such a warning cannot do so. But the [*Miranda*] Court did not hold that such an express statement is indispensable to a finding of waiver." *Id.*, at 373. Reasoning that a "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver" may support a trial court's conclusion of waiver, the decision leaves room for courts to decide "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Ibid.* "Even when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' " *Id.*, at 374-375 (quoting *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938)).

The next term, *Tague* v. *Louisiana*, 444 U. S. 469 (1980) (*per curiam*), reviewed a finding of waiver on far less evidence. The arresting officer testified that he had read Tague his rights but could not remember what the rights were, whether he had asked Tague if he understood those rights, or whether he had taken steps to insure that Tague was literate or understood the rights as they were read. *Id.*, at 469. The state court held that the burden of proof was on the defendant to show lack of understanding. *Id.*, at 469-470. This Court recognized that in *Butler* it had held waiver could be "inferred from the actions and words of a person interrogated," but in *Tague*, the evidence was insufficient to make such an inference. *Id.*, at 471. *Tague* further supports *Miranda*'s proposition that waiver of the Fifth Amendment right cannot be presumed merely from the fact that a confession is eventually obtained. The prosecution must do more, and show that the defendant knew his rights and conducted himself in such a way to show that he was waiving his rights.

These two cases discussing implied waiver serve as the bookends on a wide spectrum of conduct when there is neither an express invocation nor an express waiver. *Tague* says a confession is not enough, and *Butler* says evidence of voluntary conduct may be enough to allow the inference. The many cases that fall somewhere in between have been left to other courts to decide based on the particular facts and circumstances surrounding the case.

State v. *Kirtdoll*, 281 Kan. 1138, 136 P. 3d 417 (2006), illustrates the fact-intensive nature of this inquiry. Kirtdoll had been read his *Miranda* rights, acknowledged that he understood his rights, and then was asked whether he went by the names of Bryon, "Tru," or "Blu." *Id.*, at 1144-1145, 136 P. 3d, at 423. After answering a few questions about his name,

Kirtdoll asked for an attorney and questioning ceased. *Ibid.* The trial court found it "very, very clear from the [video]tape he was *Mirandized*[,]" that "he understood the questions and showed no hesitancy in his answers and *there is nothing that I have heard or seen that suggests that he was otherwise influenced by anything else.*" *Id.*, at 1145, 136 P. 3d, at 423 (emphasis in original). The Supreme Court of Kansas agreed. It reasoned that because "substantial competent evidence supports the district court's findings . . . under the totality of the circumstances, Kirtdoll's *Miranda* rights were knowingly and voluntarily waived and his statement was voluntarily and knowingly given." *Id.*, at 1147, 136 P. 3d, at 424. The Kansas Supreme Court reasoned that the circumstances surrounding the interrogation—its length, its lack of coercion, the fact that Kirtdoll "had already been in custody for several months prior to the interview," and no evidence of low intellect or officer unfairness—the district court was correct to reject Kirtdoll's claim that lack of waiver was insufficient to show that his statement was involuntary. *Ibid.*

Like the court in *Kirtdoll*, the state trial court in this case rejected Thompkins claim based on the particular facts surrounding Thompkins' case, and concluded he had voluntarily waived his Fifth Amendment right. The appellate court affirmed this holding. App. to Pet. for Cert. 75a. On its facts, the case falls somewhere between the bookends established by *Butler* and *Tague*.

The state court decision is not contrary to the rule established by this Court's precedents, which is that waiver need not be express and may be implied by conduct. It is distinguishable on its facts from the only two Supreme Court precedents on the question. That is sufficient to resolve the "contrary to" prong of 28

U. S. C. § 2254(d)(1). The next issue to be decided is whether there has been an unreasonable application of the rule of law to the facts.

IV. Broad deference must be given to the state court's application of a very broad rule.

Finding waiver of a constitutional right often does not rest on a single fact. See *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938) (discussing totality of circumstances test for waiver of counsel). The federal and state courts that have found implied waiver, see 2 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 6.9(d), pp. 830-832 (3d ed. 2007), have based their determinations on all of the circumstances surrounding the defendant's knowing and intelligent waiver. "In reviewing the totality of the circumstances, it is important to remember that an explicit statement of waiver is not invariably necessary . . . ." *Gorham* v. *Franzen*, 760 F. 2d 786, 794 (CA7 1985). In *Gorham*, the court stressed the defendant's extensive prior history with the criminal justice system, as well as his acknowledgment that he understood his rights as they had been given to him, to determine that Gorham had waived his rights. *Ibid.*

A similar approach was taken in *People* v. *Davis*, 55 N. Y. 2d 731, 733, 431 N. E. 2d 634, 634 (1981), when the court inferred waiver from the suspect's conduct partly because the "defendant had been arrested on approximately 11 prior occasions." Of course, familiarity with officers and the criminal justice system is not the only circumstance that may be relied upon to demonstrate waiver. In *State* v. *Williams*, 334 N. C. 440, 462, 434 S. E. 2d 588, 601 (1993), the defendant responded affirmatively to the officer's question of whether he understood his *Miranda* rights, and "nei-

ther promises, nor threats, nor trickery were used to elicit defendant's statements . . . ." The court concluded that the evidence was "sufficient to justify the trial court's ruling that he impliedly waived his rights." *Id.*, at 464, 434 S. E. 2d, at 602. The court reached this conclusion even though Williams "stood mute" when asked if he wished to waive his rights. *Id.*, at 463, 434 S. E. 2d, at 601.

When a general rule—such as totality of the circumstances—is being used, application of the rule necessarily "demand[s] a substantial element of judgment." *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004). *Alvarado* explains that the "reasonable judgment" of the state court must be assessed against "the nature of the relevant rule." A specific rule may have a narrow range of reasonable judgment, but "[t]he more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Ibid.*

Some aspects of the *Miranda* rule are quite specific, and that specificity is one of the rule's virtues. See *Withrow* v. *Williams*, 507 U. S. 680, 694 (1993). However, some aspects of *Miranda* remain general. The question of when a person is in custody is sometimes general. See *Alvarado*, 541 U. S., at 664-665. In a case such as the present one that lies somewhere in the broad range between the bookends of *Butler* and *Tague*, the question of implied waiver is similarly general.

On one hand, the facts of Thompkins' interrogation could be interpreted to find that Thompkins did not waive his right. Thompkins did not say much throughout the course of the interrogation, and much of his communication was nonverbal. *Thompkins* v. *Berghuis*, 547 F. 3d 572, 585-586 (CA6 2008). He also gave simple answers to questions, and often responded to Detective Helgert by saying, "I don't know." *Id.*, at 585. The record also demonstrates that it was not until

Detective Helgert asked Thompkins about his faith, near the end of the interview, that Thompkins made a statement that would incriminate him. *Ibid.* These facts could be interpreted by a fair-minded jurist to fit within *Miranda*'s rule that "a valid waiver will not be presumed simply from the silence of the accused after the warnings are given, or simply from the fact that a confession was eventually obtained." *Miranda*, 384 U. S., at 475.

Other facts point in the opposite direction, and are consistent with a holding that Thompkins did waive his rights. See *North Carolina* v. *Butler*, 441 U. S. 369, 373 (1979). Detective Helgert did testify that Thompkins talked "very sporadically" with the officers throughout the course of interrogation. *Thompkins*, 547 F. 3d, at 585; J. A. 9a. He made eye contact with the officers, nodded his head, and as far as Detective Helgert and the Michigan courts were concerned, indicated through his conduct that he had no objections to continuing the interrogation. See App. to Pet. for Cert. 75a; see also *Butler*, *supra*, at 373, n. 4 ("in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated"). The Michigan Court of Appeals implicitly concluded that this was the kind of "course of conduct" that *Butler* indicated could demonstrate waiver. See App. to Pet. for Cert. 75a-76a. "Even on the assumption that its conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review." *Brown* v. *Payton*, 544 U. S. 133, 143 (2005).

The Sixth Circuit placed heavy emphasis on Detective Helgert's answers to loaded questions asked by defense counsel on cross-examination. See *Thompkins*, 547 F. 3d, at 585, and n. 5. For example, when asked by defense counsel if Thompkins had "consistently . . . for two hours and fifteen (15) minutes every time you gave

[Thompkins] an opportunity to participate meaningfully in the conversation he exercised his right to remain silent," Helgert replied, "*[l]argely* he remained silent, that's correct." *Id.*, at 585, n. 5 (emphasis added); see also J. A. 18a-19a. But other jurists might have reviewed the same testimony and concluded from the word "largely" that Helgert was testifying that Thompkins engaged in some conversation. The same is true of defense counsel's characterization of Thompkins conduct as remaining silent "continuously for two hours and forty-five (45) minutes in terms of substantive responses to your attempts . . . ." *Ibid.*; see also J. A. 20a. It evoked Detective Helgert's similar, qualified response, of "[m]uch of the time. Most of the time, yes." *Ibid.*; see also J. A. 20a. Counsel clearly wanted Detective Helgert to characterize the interrogation as entirely one-sided, but Helgert maintained that Thompkins remained communicative, albeit minimally. On these facts, nothing in this Court's jurisprudence compels a conclusion that Thompkins desired to cut off interrogation or forbids a conclusion that he implicitly waived his *Miranda* rights. The Michigan Court of Appeals ruling fits within this Court's Fifth Amendment matrix.

A federal court should not "grant relief under AEDPA by conducting [its] own independent inquiry into whether the state court was correct as a *de novo* matter." *Alvarado*, 541 U. S., at 665. A reasonable jurist looking at the same facts could have applied *Butler*'s general rule and held the prosecution had met its burden of showing knowing and intelligent waiver. *Alvarado* instructs that federal courts cannot grant relief under this standard unless the state's conclusion was "objectively unreasonable." *Id.*, at 665-666 (citing *Williams* v. *Taylor*, 529 U. S., at 410; *Lockyer* v. *Andrade*, 538 U. S. 63, 75 (2003)). Given the generality of the governing rule and the resulting breadth of deference

required, it was error to overturn the state court's judgment in this case.

V. On the ineffective assistance claim, the Sixth Circuit committed the same error as in *Woodford* v. *Visciotti*.

In the present case, at the beginning of the effective assistance portion of its opinion, see App. to Pet. for Cert. 79a, the state appellate court correctly stated the standard of *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). The fact that the state court cited state case law incorporating the *Strickland* standard rather than citing *Strickland* directly does not matter. See *Yarborough* v. *Gentry*, 540 U. S. 1, 6 (2003) (*per curiam*). As in *Gentry*, we have a statement of the correct standard and a conclusion that the defendant has not met the standard. Compare *ibid.*, with App. to Pet. for Cert. 79a, 81a.

The Sixth Circuit stated that "the Michigan Court of Appeals appeared to accept that counsel's failure to request a limiting instruction was error and simply denied Thompkins' ineffectiveness claim because it found a lack of prejudice . . . ." *Thompkins* v. *Berghuis*, 547 F. 3d 572, 590 (2008). However, the state appellate court opinion says nothing about the performance prong of *Strickland*, and that silence does not imply a finding. *Strickland* is quite clear that a court may address the prejudice prong first and deny the claim on that basis without deciding the performance prong. See 466 U. S., at 697.

The Sixth Circuit's ineffective assistance of counsel holding is the same sort of overly critical review that this Court has rejected before. In *Woodford* v. *Visciotti*, 537 U. S. 19 (2002) (*per curiam*), this Court found the Ninth Circuit had mischaracterized the state court

opinion in finding that it had used the wrong standard to determine prejudice. *Id.*, at 22. This Court took issue with the Ninth Circuit's readiness to attribute error to the state court's reasoning, *id.*, at 23-24, and found it inconsistent with the presumption that state courts know and follow the law. *Id.*, at 24. The Ninth Circuit's conclusion was also inconsistent with § 2254(d)'s highly deferential standard. *Ibid.*

In the present case, quoting a single sentence from the state court opinion, the Sixth Circuit concluded that "[t]he Michigan Court of Appeals applied *Strickland* in an objectively unreasonable manner in this case because its analysis of prejudice was fundamentally flawed." *Berghuis*, 547 F. 3d, at 591. Read fairly, and as a whole, the state court's opinion shows that it understood and applied the correct standard. See App. to Pet. for Cert. 79a-81a.

In its decision, the Sixth Circuit found the state court's analysis of prejudice to be unreasonable by relying on the latter's statement, "the record does not disclose an attempt to argue [regarding Purifoy's] conviction for an improper purpose." *Thompkins*, 547 F. 3d, at 591. The Michigan Court of Appeals finding was not based on that fact alone. Rather, its decision was based on its belief that Thompkins had not shown prejudice. App. to Pet. for Cert. 80a-81a. The state court's statement quoted above is not fairly read as referring to the prosecution's motive, as the Sixth Circuit read it. See *Thompkins*, *supra*, at 591-592. Rather, this statement is more naturally read to say that the prosecution did not argue to the jury that they should consider the statement for an improper purpose. Such argument, or lack of it, is a relevant fact in deciding the likelihood that the jury actually did misuse the evidence. Cf. *Middleton* v. *McNeil*, 541 U. S. 433, 438 (2004) (*per curiam*) (role of prosecutor's argument

in assessing likelihood jury was misled by conflicting instructions). That likelihood in turn is relevant to the assessment of prejudice under *Strickland*.

Finally, given the number of appeals that state courts must address, a state appellate court decision cannot be expected to be a detailed discourse on every issue. State appellate courts have heavy workloads. See *Baldwin* v. *Reese*, 541 U. S. 27, 31 (2004). So long as the court demonstrates that it knows and follows the law, it is not unreasonable to ask the habeas court to afford its written opinion some leeway.

The Michigan Court of Appeals applied the correct Supreme Court standard, and reached a reasonable conclusion based on that standard. The Sixth Circuit was incorrect to grant habeas on ineffective assistance grounds.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals should be reversed.

December, 2009

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1470

IN THE

Supreme Court of the United States

MARY BERGHUIS, WARDEN,

Petitioner,

v.

VAN CHESTER THOMPKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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---

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers ("NACDL") and the American Civil Liberties Union ("ACLU") respectfully submit this brief as *amici curiae* in support of respondent Van Chester Thompkins.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made such a monetary contribution. This brief is filed with the consent of all the parties.

The NACDL, founded in 1958, is a non-profit corporation with more than 12,000 direct members nationwide and in 28 countries, and more than 40,000 affiliate members in 90 state, provincial and local affiliate organizations. NACDL members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges.

Among the NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. The NACDL files approximately fifty *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues. The NACDL has participated as an *amicus* in a number of cases addressing the scope of this Court's opinion in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *See, e.g.*, *Missouri* v. *Seibert*, 542 U.S. 600 (2004); *Dickerson* v. *United States*, 530 U.S. 428 (2000).

The ACLU is a nationwide, non-profit, non-partisan organization with over 500,000 members. Since 1920, the ACLU has been dedicated to preserving the principles of liberty and equality embodied in the Constitution and the civil rights laws of this country. Many of the ACLU's efforts have focused on enforcing those portions of the Bill of Rights having to do with the administration of criminal justice, including participation as *amicus curiae* in *Seibert*, *Dickerson*, and *Miranda* itself.

Proper resolution of this case is a matter of concern to *amici* and their members. As we explain below, the positions advocated by petitioner conflict irreconcilably with this Court's pronouncements. They likewise conflict with current police practice and, if

adopted, would undermine the settled practices of law enforcement officers across the country. Finally, and fundamentally, they would have the effect of nullifying *Miranda*'s waiver requirement. If a suspect's eventual inculpatory statement suffices to show waiver, then there will *always* be waiver; no *Miranda* case would ever be litigated in the absence of an inculpatory statement. Under a proper reading of the Fifth Amendment and this Court's cases, the petitioner's newly-minted rules should be rejected and the decision of the Sixth Circuit affirmed.

STATEMENT

The procedural history and facts have been laid out by the parties. *Amici* offer this Statement to clarify certain details regarding respondent's interrogation.

Detectives Christopher Helgert and Dave Doweling interrogated respondent Thompkins at an Ohio jail on February 22, 2001. J.A. 8a. At the outset, Helgert read Thompkins his *Miranda* rights from a preprinted sheet. *Id.* Helgert then asked Thompkins to sign the sheet to indicate that he understood his rights. J.A. 9a. Thompkins refused to do so. J.A. 9a. Helgert offered conflicting testimony about whether he ever asked Thompkins orally if Thompkins understood his rights. At a pre-trial suppression hearing, Helgert testified: "I believe I asked him if he understood the [r]ights, and I think I got a verbal answer to that as a 'yes.'" J.A. 9a. However, at trial, when asked whether he inquired if Thompkins understood his rights, Helgert testified: "I don't know that I orally asked him that question." J.A. 148a.[2]

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[2] As the Solicitor General correctly observes, the Michigan Court of Appeals resolved this conflict in favor of Helgert's

What *is* clear from the record is that the detectives chose not to seek an express *Miranda* waiver. The form the detectives presented to Thompkins only asked him to acknowledge that he *understood* his rights. Pet. Br. 60. It was not a waiver form. And importantly, the detectives made a strategic choice not to ask Thompkins whether he would be willing to waive his rights, or whether he would be willing to talk about the case, presumably because doing so risked invocation. Instead, they immediately commenced a lengthy interrogation. J.A. 10a, 15a.

Helgert described the interrogation as "nearly a monologue," during which he and Doweling repeatedly returned to the theme that Thompkins "was involved [in the crime] and that * * * this was his opportunity to explain his side." J.A. 17a, 10a. Helgert testified that Thompkins was "uncommunicative" throughout the interrogation, that he "sat there and listened to our speech," and that he "spent a lot of his time * * * simply holding his head looking down." J.A. 10a, 22a, 152a. The detectives used a variety of "themes" during the interrogation, all in an attempt to get Thompkins to talk, but the effort "wasn't productive." J.A. 151a, 152a. Asked whether Thompkins "consistently exercised his right to remain substantively silent," Helgert replied in the affirmative. J.A. 20a.

Helgert did testify that Thompkins offered "very limited verbal responses" during the hours of interrogation, that he occasionally said, "yeah," "no," or "I don't know," and that he occasionally made eye

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initial testimony, finding that Thompkins "verbally acknowledged that he understood [his] rights," Pet. App. 75a, and Thompkins has not challenged that finding. *See* U.S. Br. 3 n.2.

contact with the detectives. J.A. 10a, 21a, 23a-24a. But the record demonstrates that none of those limited responses came in reaction to substantive questions about the crime. Helgert twice testified that Thompkins had no "significant response" to any of the detectives' attempts to convince him to discuss the crime. J.A. 149a, 150a. He likewise testified that his prolonged attempt to get Thompkins to tell his side of the story "did * * * not [e]licit any admissions or denials; for that matter, it didn't really [e]licit any sort of reaction." J.A. 152a. Helgert testified that Thompkins' eventual inculpatory statement was "[t]he only thing" Thompkins said during the interrogation "relative to his involvement" in the crime. J.A. 10a-11a. And when he tried to recount what Thompkins *did* say during the interrogation, Helgert could point to only two statements: that Thompkins said he "didn't want a peppermint that my partner offered him, and [that] the chair that he was sitting in was hard." J.A. 152a. Finally, as for the eye contact, Helgert testified that Thompkins looked at him only a "few times" during the entire interrogation, J.A. 11a, and that Thompkins did so when Helgert commanded it. J.A. 149a ("[H]e would look down or look away and I would * * * have to call him back and ask him to, you know, look at me and pay attention.").

After nearly three hours straight spent questioning a silent Thompkins, Helgert changed tactics. He asked Thompkins whether he believed in God, and Thompkins' eyes "well[ed] up with tears." J.A. 11a. Helgert asked whether Thompkins prayed, and Thompkins answered in the affirmative. J.A. 11a. Finally, Helgert asked Thompkins: "Do you pray to God to forgive you for shooting that boy down?" J.A.

153a. Thompkins said "Yes." J.A. 153a. The interrogation ended soon after. J.A. 11a.

SUMMARY OF ARGUMENT

This case presents questions about the scope of two of *Miranda*'s fundamental safeguards: first, the waiver of rights that is a "prerequisite[ ] to the admissibility of any statement made by a defendant," 384 U.S. at 476, and second, the defendant's power to invoke his rights at any time and "cut off questioning." *Id.* at 474. The Sixth Circuit may be affirmed on either ground.

Thompkins never waived his right to remain silent. Under *Miranda* and its progeny, police must obtain a waiver before they interrogate, and the detectives did not do that here. *Miranda*'s "waiver first" rule is the most effective way to avoid the very evil that case sought to address—namely, that the highly coercive and intimidating custodial environment compels unwilling suspects to speak. If a suspect waives his rights prior to interrogation, then the waiver presumably[3] is made out of the suspect's uncoerced volition. If not, then a "waiver by confession" hours later is presumed to be the product of the interrogation environment—just the sort of coerced "waiver" *Miranda* sought to prevent.

Moreover, even if the Court sees fit to allow interrogation to begin without a waiver, the government still must shoulder a heavy burden to prove that waiver occurred at a later time. The Court estab-

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[3] It is possible, of course, that a suspect could be coerced into waiver through pre-interrogation threats or deception. Those issues are not presented by this case.

lished in *Miranda*, and subsequently reiterated in the very case on which petitioner chiefly relies, that the government's burden to prove a valid, voluntary waiver is "great." *North Carolina* v. *Butler*, 441 U.S. 369, 373 (1979). Given *Miranda*'s concern with the coercive pressures of lengthy interrogation, the government cannot meet that "great" burden unless the suspect begins responding to police shortly after interrogation begins. And the government certainly cannot meet its burden on this record.

In any event, Thompkins affirmatively invoked his right to silence by remaining silent during extended interrogation. That Thompkins occasionally made eye contact or offered one-word responses to nonsubstantive inquiries does not change that fact, because the record indicates that he was not responding to interrogation—*i.e.*, to "words or actions * * * reasonably likely to elicit an incriminating response." *Rhode Island* v. *Innis*, 446 U.S. 291, 301-302 (1980). A suspect who responds to an interrogator's basic pleasantries, but says absolutely nothing and stares at the floor for hours in response to investigative questions, invokes his right with all the clarity that *Miranda* requires.

The petitioner and the Solicitor General advocate contrary rules for both waiver (arguing that "waiver by confession" after hours of interrogation is acceptable) and invocation (arguing that only an oral statement will suffice). Those proposed rules would overturn this Court's clearly established holdings. They also fly in the face of actual police practice. This Court should reject the invitation to eviscerate *Miranda* in a way that will only create uncertainty for officers trained under the current regime.

ARGUMENT

I. THOMPKINS NEVER WAIVED HIS RIGHT TO SILENCE.

A. Any Waiver Must Precede The Start of Interrogation.

Miranda and its progeny make clear that waiver is a condition precedent to interrogation; a suspect must be read his *Miranda* rights, and must waive them, before interrogation can begin. There is no claim in this case that the detectives sought such a pre-interrogation waiver or that Thompkins gave one. For that reason alone the Sixth Circuit should be affirmed.

1. Waiver must precede interrogation. The *Miranda* Court explained that warnings are to be given "[a]t the outset, if a person in custody is to be subjected to interrogation," 384 U.S. at 467, and that warnings and waivers go together: "After * * * warnings have been given, and such opportunity [to invoke the *Miranda* rights] afforded * * *, the [suspect] may knowingly and intelligently *waive these rights and agree to answer questions* or make a statement." *Id.* at 479 (emphasis added). This sentence clearly contemplates that the suspect first will be warned and asked if he wants to invoke or waive his rights. At that point he can "agree to answer questions"—*i.e.*, undergo interrogation. Absent waiver, the suspect's rights remain intact.

That understanding of *Miranda* makes good sense given the Court's concern with the compulsion inherent in custodial interrogation. The *Miranda* Court recognized that "[t]he circumstances surrounding in-custody interrogation can operate very quickly to

overbear the will of one merely made aware of his privileges by his interrogators." 384 U.S. at 469. Thus, it explained, "the fact of lengthy interrogation * * * before a statement is made is strong evidence that the accused did not validly waive his rights," but instead eventually succumbed to "the compelling influence of the interrogation." *Id.* at 476. It would not have made sense for the Court to permit waiver at the tail end of an interrogation given its conclusion that a waiver triggered by the interrogation process itself is invalid.

The Court reiterated *Miranda*'s "waiver first" principle in subsequent cases. In *Davis* v. *United States*, 512 U.S. 452 (1994), for example, the Court explained that "[i]f the suspect effectively waives his right to counsel after receiving the Miranda warnings, law enforcement officers are free to question him." *Id.* at 458. Likewise, in *Seibert*, *supra*, (plurality op.), the Court explained that "failure to give the prescribed warnings and obtain a waiver of rights *before custodial questioning* generally requires exclusion of any statements obtained." 542 U.S. at 608 (emphasis added). These statements can only be understood to contemplate that waivers are to occur prior to interrogation. No such pre-interrogation waiver occurred here.[4]

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[4] The Solicitor General argues that the statement in *Davis* "merely reflects the facts of *Davis*," and that the statements in *Seibert* are dicta because *Seibert* "did not involve a question of waiver after prior warnings." U.S. Br. 22. But the statements in *Miranda* itself disapproving waivers triggered by the interrogation process were not dicta; they were a "rationale for the holding of the case." *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 594 (2002) (Kennedy, J., concurring). And the Court in *Davis* and *Seibert* chose to frame its understanding

2. Even putting *stare decisis* aside, there are three reasons why the Court should not overturn the well-established "waiver first" rule. First, it aligns with *Miranda*'s understanding of the interrogation process. The *Miranda* Court accepted as a basic premise that "the compelling influence of the interrogation" could eventually "force[ ]" a suspect to make a statement even if he never intended "voluntary relinquishment of the privilege." 384 U.S. at 476. The Court accordingly held that "the fact of lengthy interrogation * * * before a statement is made is strong evidence that the accused did not validly waive his rights." *Id.* Those principles are honored if the waiver is obtained at the outset, before interrogation exerts its "compelling influence."

Second, "waiver first" provides a bright line that police can easily follow. *See Colorado* v. *Spring*, 479 U.S. 564, 577 n.9 (1987) (lauding "the *Miranda* rule's important 'virtue of informing police and prosecutors with specificity' as to how a pretrial questioning of a suspect must be conducted") (quoting *Fare* v. *Michael C.*, 442 U.S. 707, 718 (1979)). If investigators are instructed to affirmatively seek a waiver at the outset (and many already are, as discussed below), it will usually be clear whether the suspect has waived his rights. Law enforcement officials will not be put in a position of trying to later decide whether ambiguous signals from the suspect during the course of a long subsequent interrogation add up to waiver. Instead, the suspect will either agree at the com-

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of *Miranda* in terms that confirm a "waiver first" regime. Moreover, the only snippet of authority to which the Solicitor General points for her preferred contrary rule is itself classic obiter dictum—not just unnecessary to the holding, but also conditional and phrased in the negative. *See infra* at 14.

mencement of an interrogation to talk about the case—or he will not.

Last but not least, the "waiver first" rule is beneficial because it conforms to the current guidance offered by many (though not all)[5] leading police-training resources. These manuals have long understood *Miranda* to require waiver prior to interrogation, and have instructed law enforcement officials accordingly. For example, Inbau & Reid's *Criminal Interrogation and Confessions*—the "undisputed bible of police interrogation,"[6] cited in *Miranda* and nine other decided cases of this Court—instructs that "[t]he only time a police interrogation may be conducted of a suspect who is in custody * * * is after he has received the required warnings *and after he has indicated a willingness to answer questions. Once that waiver is given, the police may proceed with the interrogation.*" F. Inbau *et al.*, *Criminal Interrogation & Confessions* 491 (4th ed. 2001) (emphasis added) (hereinafter "Inbau Treatise"). Likewise, a modern handbook for police interrogators instructs police to ask a suspect at the outset: "Do you understand each of these rights that I have explained to you? Having these rights in mind, are you willing to waive them and answer my questions?" and offers the following "tip": "Always ask yourself, 'after

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[5] As we discuss below, some training programs instruct police that they may seek implied waivers after interrogation has begun, and there is no doubt many police officers do so. But even that more aggressive approach to waiver usually requires that the suspect begin talking quickly after interrogation commences; it is rarely taken to the lengths advocated by the petitioner here. *See infra* at 18-19, 32-34.

[6] R. Thomas Jr., *Fred Inbau, 89, Criminologist Who Perfected Interrogations*, N.Y. Times, May 28, 1998, at B9.

giving the warning, did I make sure to secure an affirmative waiver?" J. Stephen *et al.*, *Officer's Interrogation Handbook* 67-68 (2004). The U.S. Department of Homeland Security's handbook is to the same effect. It states the point succinctly: "Once an individual taken into custody has been given the proper *Miranda* warnings, there is one more requirement *before any interrogation. Prior to questioning*, the suspect must make a voluntary, knowing and intelligent waiver of his rights under *Miranda*." Department of Homeland Security, *Legal Division Handbook* 491 (2009) (emphasis added). Leading training resources, in short, understand the Court to have meant what it said in *Davis* and *Seibert*: Police must "obtain a waiver of rights before custodial questioning." *Seibert*, 542 U.S. at 608.

3. Seeking to overturn settled law, petitioner and the Solicitor General assert that if a suspect "take[s] no action to invoke or waive his rights, * * * the police may conduct interrogation." U.S. Br. 19. Their briefs point to no real authority for the proposition. The Solicitor General's brief largely relies on a narrow construction of *Miranda*'s purpose: It asserts that "[t]he primary protection" afforded by *Miranda* "is the *Miranda* warnings themselves" and that the "critical safeguard" provided by *Miranda* is the "right to cut off questioning."[7] From this premise it draws the strangely restrictive conclusion that *Miranda* does not also require pre-interrogation waivers. But that is illogic. The fact that this Court has described the warnings, and the right to invoke them, as "primary" protections of *Miranda* hardly

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[7] U.S. Br. 20 (quoting *Davis*, 512 U.S. at 460, and *Michigan v. Mosley*, 423 U.S. 96, 103 (1975), respectively).

negates the fact that *Miranda* also described the waiver process as "fundamental." 384 U.S. at 476.

The Solicitor General also relies on *Miranda*'s statement that a defendant has the "right to choose between silence and speech * * * *throughout the interrogation process*." U.S. Br. 21 (quoting *Miranda*, 384 U.S. at 469) (emphasis and alteration in Solicitor General's brief). That excerpt has nothing at all to do with the appropriate timing of waivers. It is about subsequent *invocation* of the *Miranda* rights—and there is no dispute that a suspect can invoke his rights "throughout the interrogation process," once he has initially waived them.

Other than *Miranda*—which offers the petitioner and her *amicus* no help—the only case to which they point is *Butler*, *supra*, in which the Court suggested that a "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may * * * support a conclusion that a defendant has waived his rights." 441 U.S. at 373. *See* Pet. Br. 40-43; U.S. Br. 20-22. The Solicitor General argues that this passage must mean waivers can occur after interrogation begins, because otherwise there would be no opportunity for a suspect's "course of conduct" to manifest itself. U.S. Br. 21. Not so.

To begin with, the quoted statement is pure dictum. The defendant in *Butler* was read his rights, immediately stated, "I will talk to you, but I am not signing any form," and "then made inculpatory statements." *Butler*, 441 U.S. at 370-371. The Court held that that initial statement—"I will talk to you, but I am not signing any form," an assertion far more explicit than anything Thompkins said or did—*might*

constitute a waiver. *See id.* at 376 (vacating and remanding for further proceedings). The Court's observation about "course of conduct" thus was unnecessary to the outcome. It also was conditional and phrased in the negative. *See id.* at 373 (stating that *Miranda*'s "mere silence is not enough" rule "does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights.").

Moreover, even if the Solicitor General's favored *Butler* dictum were the law, it would not require rejection of the "waiver first" rule. The Solicitor General's argument relies on the premise that all interaction between police and suspects after warnings are administered must constitute "interrogation," and therefore that a suspect's post-warning "course of conduct" must occur, by definition, after interrogation has begun. If that were accurate, then *Butler*'s dictum would indeed be irreconcilable with the "waiver first" rule. But it is not accurate. In fact, "interrogation" means only "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 301-302 (emphasis deleted). Thus the police could read a suspect his rights, ask him non-investigative questions—"will you speak to us? Do you understand your rights?"—and observe in response to those questions a "course of conduct indicating waiver." *Butler*, 441 U.S. at 373. The suspect, for example, could nod in response to questions about whether he will speak to the police. Or, of course, the suspect could simply begin speaking to the police about the crime. Either of these responses could "indicat[e] waiver," and both

would have occurred before interrogation began. It is not necessary to relocate the waiver process to the interrogation's interior to make sense of *Butler*.

For all of these reasons, the rule advocated by petitioner and her *amicus* contradicts this Court's precedents and would require an overhaul of many of the leading police interrogation resources. That approach should be rejected. The Sixth Circuit should be affirmed on the ground that Thompkins did not waive his *Miranda* rights before interrogation began—and therefore never validly waived them at all.

B. If "Implied Waiver" After Interrogation Begins Is Ever Permissible, It Must Occur Much More Quickly Than The Purported Waiver Here.

This Court can also affirm the Sixth Circuit on a narrower ground—namely, that even assuming *dubitante* that interrogation may begin without a waiver, the "clearly established" law of this Court, 28 U.S.C. § 2254(d), sets a threshold for valid waiver that the facts of this case do not even approach. *Miranda*'s concerns about the coercive nature of lengthy interrogation require that, if implied waiver is ever permissible, it can only be found where a suspect responds to the officers' *initial* investigative questions. By contrast, where a suspect inculpates himself only after hours of silence in the face of interrogation—the facts here—the government cannot carry its heavy burden to prove that the waiver was voluntary and not the product of the lengthy grilling.

1. Under *Miranda* and its progeny, "a heavy burden rests on the government to demonstrate that the

defendant knowingly and intelligently waived his privilege against self-incrimination." *Miranda*, 384 U.S. at 475; *accord Butler*, 441 U.S. at 373 ("[T]he prosecution's burden is great."). The *Miranda* Court explained that "[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." 384 U.S. at 475. But the Court also has made quite clear what *cannot* constitute a valid waiver. "[A] valid waiver will not be presumed simply from * * * the fact that a confession was in fact eventually obtained." *Id.* Likewise, a valid waiver will not be presumed "simply from the silence of the accused after warnings are given." *Id.*; *accord Butler*, 441 U.S. at 373 (reiterating that "mere silence is not enough"). The passage of time also undercuts any attempt by the government to demonstrate waiver: Given the compelling nature of custodial interrogation, "the fact of lengthy interrogation * * * before a statement is made is strong evidence that the accused did not validly waive his rights." *Miranda*, 384 U.S. at 476. "In these circumstances, the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so." *Id.*

The *Miranda* Court's empirical conclusions remain valid today. The vast majority of police officers are trained in interrogation techniques,[8] and leading training resources describe interrogation as an

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[8] *See* S. Kassin *et al.*, *Police Interviewing & Interrogation: A Self-Report Survey of Police Practices & Beliefs*, 31 Law & Hum. Behav. 381, 388 (2007) (Eighty-two percent of experienced investigators reported receiving specialized interview and interrogation training in recent survey).

accusatory process and teach officers how to "dominate" the interrogation session. *See, e.g.*, Inbau Treatise at 7-8. The treatises also instruct officers how to convince the suspect to inculpate himself using tried-and-true interrogatory "themes," *id.* at 232-303, including telling the suspect that the officers are only there to hear his side of the story[9] and suggesting that his alleged crime was committed in self-defense.[10] The *Miranda* Court described these very tactics in support of its conclusion that custodial interrogations contain inherently compelling pressures. *See* 384 U.S. at 451-52 (citing Inbau Treatise and discussing "self-defense" tactic). And the detectives in this case employed them to the letter: They dominated the interrogation, J.A. 17a; they repeatedly testified that they tried to get Thompkins to respond to "themes," *e.g.*, J.A. 13a-17a; they told Thompkins they just wanted to hear his side, J.A. 14a, 16a-17a; and they suggested that he may have acted to protect himself, J.A. 16a. As this case amply demonstrates, time has not eroded the wisdom of presuming that waivers obtained after "lengthy interrogation," *Miranda*, 384 U.S. at 476, are involuntary and invalid.

2. To be sure, the fact that "lengthy interrogation" before confession is inconsistent with a valid waiver does not by itself doom *all* implied waivers. A different situation is presented where a suspect begins discussing the crime in response to the interrogating officers' initial post-warning questions. In that circumstance (and assuming no "waiver first" rule)

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[9] *See* Inbau Treatise at 291; *accord* R. Leo, *Police Interrogation & American Justice* 129 (2008).

[10] *See* Inbau Treatise at 285.

the suspect's statements might constitute a valid waiver, because the "compelling influence" of "lengthy interrogation" has not yet set in.

No doubt that is why, as petitioner observes, a number of lower courts have held that suspects who acknowledge their rights and then quickly answer investigative questions have impliedly waived. Pet. Br. 26-27. Reflecting those holdings, police departments in some jurisdictions have embraced the strategic use of valid waivers: They teach their officers that "every prosecutor prefers an express waiver, but it is not always possible to obtain one," and that "[w]hether to seek an express waiver" accordingly "depends on the investigator's judgment as to whether the suspect will waive or not." C. Weisselberg, *Mourning Miranda*, 96 Cal. L. Rev. 1519, 1585 (2008).[11] And while "[t]here is no empirical evidence indicating the frequency" with which officers in the departments Professor Weisselberg studied resorted to implied waivers, "a 2004 training document from the Los Angeles County District Attorney's office states that while express waivers are preferred, a 'problem' is that 'most police do not use' them." *Id.* at 1586 (quoting Hyatt Seligman, *Miranda & More*, Los Angeles District Attorney's Office Training Division (2004)).

However, the fact that implied waiver practices appear to have gained a foothold in some places (*but see supra* at 11-12) hardly means the practice should have no limits. On the contrary, it only underscores the need for this Court to ensure that such practices—if accepted at all—conform to the basic princi-

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[11] Citing, *e.g.*, POST Telecourse, *Interrogation/Confessions: Legal Issues* (Aug. 1995).

ples of the Fifth Amendment. Without such limits, police can eviscerate *Miranda* by avoiding any discussion of waiver, launching straight into lengthy questioning, and relying on the compelling pressures of interrogation to produce an involuntary waiver they otherwise could not have obtained. Indeed, that is just what happened here.

This Court can solve the problem by holding that if an officer decides for strategic reasons to administer warnings and immediately begin questioning, a waiver may be implied only if the suspect responds to the officer's *initial* investigative questions.[12] If the suspect does not immediately respond—in other words, if the suspect remains silent or otherwise indicates that he does not wish to speak about the crime—there has been no waiver and the interrogation must cease. Finally, if the officer is unsure of the meaning of the suspect's response, the officer may elect to clarify by seeking an express waiver. Assuming no "waiver first" rule for present purposes, such a holding would be consistent with *Miranda* and its progeny. After all, if the "compelling influence" of "lengthy interrogation" has not yet taken hold, *Miranda*, 384 U.S. at 476, the *Miranda* Court's animating concern—that waiver will be coerced—is alleviated.

But that, of course, is not this case. Where, as here, a suspect maintains his silence for hours, only to succumb to sophisticated techniques that this Court has found to impart compelling pressures, the

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[12] Of course, the suspect's response would still have to allow for a clear inference of waiver; otherwise the government could not carry its burden. Responding to innocuous police questions unrelated to the crime is not enough. *See infra* at 20-22.

State cannot carry its "heavy burden" to prove a valid, voluntary waiver. There can be no conclusion but that the compelling influences of the interrogation finally forced Thompkins to speak.

3. The petitioner appears to advance two separate contrary arguments: first, that Thompkins waived his right to silence by sporadically making eye contact with, and offering one-word verbal responses to, his interrogators; and second, that Thompkins waived his rights when he inculpated himself at the very end of the interview. We address them in turn.

a. Thompkins very clearly did not waive his *Miranda* rights by dint of his "very limited verbal responses," J.A. 10a, prior to the inculpatory statements. The government's own testimony establishes that Thompkins was "uncommunicative," that he "sat there and listened to [the detectives'] speech," and that he "spent a lot of his time * * * simply holding his head looking down." J.A. 10a, 22a, 152a. While the detective testified that Thompkins occasionally offered a "yeah," "no," or "I don't know," J.A. 23a, the record contains no evidence that *any* of these responses came in reaction to an actual interrogation question—*e.g.*, a question "reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 301-302. On the contrary, the detective's other testimony—that his interrogation questions "didn't really [e]licit any sort of reaction," J.A. 152a, and that Thompkins' eventual inculpatory statement was "[t]he only thing" Thompkins said during the interrogation "relative to his involvement" in the crime, J.A. 10a—establishes that Thompkins' interjections could *not* have come in response to substantive interrogation questions. Likewise, any eye contact

Thompkins made was commanded by the detectives themselves. *See* J.A. 149a. And of course, the only verbal statements Detective Helgert could actually remember Thompkins making were that he "didn't want a peppermint" and that "the chair that he was sitting in was hard." J.A. 152a.

This evidence does not come close to carrying the government's "heavy burden" of proving that Thompkins intended to waive his right to silence. *Miranda*, 384 U.S. at 475. Thompkins' generally silent mien is not enough to establish a "clear[ ]" implication of waiver. *Butler*, 441 U.S. at 373. Were it otherwise, a police officer could always trick a suspect into waiving by asking mundane questions—"are you feeling OK?" "Are you comfortable?" "Would you like a peppermint?"—or by demanding that the suspect make eye contact. On the State's theory, once the suspect responds to the peppermint request and meets a detective's eyes, waiver may be presumed.

Moreover, any ambiguities about what Thompkins said stem from the detectives' own strategic choices. The detectives chose not to seek an express waiver, presumably because they did not think Thompkins would waive his rights. The detectives likewise chose not to record the interrogation session, even though they had planned it in advance and easily could have arranged to do so. J.A. 160a. The ambiguities that resulted from these choices must be resolved against the government given its burden to prove waiver.

Perhaps recognizing the weakness of her argument on this point, petitioner advances it only half-

heartedly.[13] Indeed, her brief never tries to explain why Thompkins' occasional "yeahs" and "nos" could amount to waiver; she instead retreats to the *habeas* standard and argues that clearly established law does not favor Thompkins because this Court has never examined the effect of a suspect's isolated verbalizations. Pet. Br. 26-28. But "AEDPA does not require * * * courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007) (quotation marks & citation omitted). "The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Id.* A holding that Thompkins' behavior amounted to waiver would unreasonably apply the "general standard" announced in *Miranda* and *Butler*.

b. Petitioner—this time joined by the Solicitor General—also advance a second waiver argument: Swinging for the fences, they contend that even if Thompkins were silent throughout the interrogation, his eventual inculpatory statements *themselves* supply the requisite waiver. *See* Pet. Br. 28, 34; U.S. Br. 23-31. This remarkable argument contradicts the clear holdings of both *Miranda* and its progeny.

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[13] Notably, the Solicitor General's brief *never* advances it. U.S. Br. 23-31. On the contrary, her brief appears to undermine the argument's factual premise and steer the Court away from any reliance on Thompkins' unexplained "yeahs" and "nos." *See id.* at 10 ("For much of the interview, *respondent was silent*, but when the police appealed to his religious beliefs, respondent answered a series of questions.") (emphasis added); *id.* at 25 (arguing that the only "relevant question" is whether Thompkins waived his rights when he inculpated himself at the interrogation's close).

If accepted, it would have the effect of nullifying *Miranda*'s waiver requirement in all but the exceptional case. After all, *Miranda* waiver cases would never be litigated if the suspect did not make an inculpatory statement—and yet under petitioner's formulation, an inculpatory statement (and proof that the suspect received and understood the warnings) is all that is required to prove that the waiver was valid.

i. The "confession equals waiver" argument is foreclosed several times over by *Miranda* itself. The *Miranda* Court (and the cases that followed) explained that a valid waiver cannot "'be presumed simply from the silence of the accused after warnings are given *or simply from the fact that a confession was in fact eventually obtained.*'" *Butler*, 441 U.S. at 373 (quoting *Miranda*, 384 U.S. at 475) (emphasis added). *Miranda* also held that "any evidence that the accused was * * * cajoled into a waiver" renders the waiver involuntary, 384 U.S. at 476—a holding that cannot be reconciled with petitioner's argument because if confession equals waiver, then interrogation aimed at cajoling the suspect into *confessing* is also aimed at cajoling the suspect into *waiving*.

The rule espoused by petitioner and the Solicitor General flies in the face of these holdings. Under their rule, waiver would be established precisely from "the silence of the accused" and "the fact that a confession was in fact eventually obtained." *Butler*, 441 U.S. at 373. The Solicitor General's brief puts the conflict in stark relief. It argues: "Respondent *listened to police questions for a time*, without either invoking or waiving his rights, *but he ultimately decided to speak*. That course of conduct evidenced a

knowing, intelligent, and voluntary waiver of his Miranda rights[.]" U.S. Br. 7 (emphases added). That argument—which, it should be noted, is the lone contention the Solicitor General advances for reversal of the Sixth Circuit's waiver holding—simply cannot be reconciled with *Miranda* and its progeny.[14]

ii. In support of her newly minted rule, petitioner argues that Thompkins "indicated his desire to forego his rights"—and therefore waived them—because he knew that he could end the interview at any time but he eventually answered questions anyway. Pet. Br. 40. For this proposition petitioner relies on cases indicating that "[t]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." Pet. Br. 37 (quoting *Davis*, 512 U.S. at 460). According to petitioner, these cases compel the conclusion that so long as a suspect is "able to make a knowing decision about whether to exercise [his] rights," Pet. Br. 35, no more is required, and any subsequent inculpatory statement is automatically a valid waiver.

But this argument is doubly flawed. First, it favors only some elements of *Miranda* while ignoring others. The Court in *Miranda*—again—was concerned not just with warnings, but also with the "compelling influence" associated with custodial

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[14] It also is inconsistent with the lower-court cases (*see* Pet. Br. 26-27) approving implied waivers. As respondent explains in his merits brief (Br. 21-22), these cases all involve "a refusal to sign a waiver of rights form followed *shortly thereafter* by a confession." (emphasis added). Cases with those facts certainly do not suggest judicial approval of "waiver" by way of endless interrogation that finally triggers confession.

interrogation. *Miranda*, 384 U.S. at 476. That is precisely why it held that "the fact of lengthy interrogation * * * before a statement is made * * * is consistent with the conclusion that the compelling influence of the interrogation finally forced" the suspect into a waiver, and that such interrogation "is strong evidence that the accused did not validly waive his rights." *Id.*; *see supra* at 9-10. In the face of such "strong evidence" against valid waiver, the government cannot carry its "great" burden, *Butler*, 441 U.S. at 373, to demonstrate that the waiver was valid.

Second, petitioner's (and the Solicitor General's) approach has no stopping point. Under petitioner's view of things, a suspect could sit in complete silence for hours or days of interrogation, yet be held to have "voluntarily" waived his right to silence if and when he is eventually worn down and finally makes an inculpatory statement. Such a rule not only flies in the face of common sense; it also flouts *Miranda*'s observation about "the compelling influence of the interrogation"—not to mention *Miranda*'s command never to find waiver based on silence followed by confession.[15]

It is no answer to say the suspect could invoke his rights and stop such an interrogation. As an initial matter, an extended period of silence should be understood as just such an invocation. *See infra* at 26-32. But in any event, "[i]nvocation and waiver are entirely distinct inquiries, and the two must not be

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[15] By contrast, a rule that implied waiver may be found where the suspect is Mirandized and then responds to his interrogators' initial questions does not contradict these basic tenets of *Miranda*. *See supra* at 19.

blurred by merging them together." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984). It is black-letter law that the government must prove that a suspect first waived his *Miranda* rights, regardless of whether he later invoked them.

II. THOMPKINS INVOKED HIS RIGHT BY REMAINING SILENT IN THE FACE OF INVESTIGATIVE QUESTIONS.

The Sixth Circuit determined that Thompkins did not waive his right to silence, and it therefore did not reach the separate question whether he affirmatively *invoked* that right, such that the detectives should have ceased their questioning. This Court can and should follow that sensible approach. However, if it reaches the question of invocation, the Court should hold that Thompkins invoked his right to silence by refusing, for nearly three hours of interrogation, to say anything at all about the crime of which he was accused.

A. Thompkins' Silence Was Sufficient On These Facts To Invoke The Right To Silence.

1. This Court explained in *Miranda*, and has since reaffirmed, that if a suspect "*indicates in any manner*, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-474 (emphasis added); *accord Moran* v. *Burbine*, 475 U.S. 412, 420 (1986) (same); *Fare*, 442 U.S. at 709 (same). "Indication" is a broad concept, denoting "something (as a signal, sign, suggestion) that serves to indicate." *Webster's Third New International Dictionary* 1150 (1986).

Plainly, one "sign" a suspect can offer that he "wishes to remain silent" is to do just that—remain silent.

Indeed, this is the only reasonable interpretation of the "indicates in any manner" standard. The reasonable individual, told that he has the right to remain silent, is going to assume that by remaining silent during interrogation he has invoked the right. It would be curious, to say the least, if he were required to speak to demonstrate that he wishes to remain silent. This Court understood as much when, in *Miranda*, it clearly established that invoking the right to silence only requires an "indica[tion]" of that desire, 384 U.S. at 473, as opposed to, say, a "statement." Thompkins' categorical refusal to answer investigative questions over the course of several hours of questioning was just such an "indicat[ion.]"

2. The Solicitor General argues that "this case does not present the question of whether a suspect who remains mute invokes his right to silence * * * because respondent did not remain mute in the face of police questioning. Rather, he 'continued to talk' with the officers, albeit 'sporadically.'" U.S. Br. 18 (quoting J.A. 9a). But that is an inappropriately selective description of the facts. The record shows that while Thompkins may have said "yeah" or "no" sporadically, he did not do so in response to questions about his alleged crime. *See supra* at 20-21. He therefore exercised his right not to "respond[ ] to interrogation." *Solem* v. *Stumes*, 465 U.S. 638, 645 n.5 (1984) (quoting *Johnson* v. *New Jersey*, 384 U.S. 719, 729-730 (1966)); *see Innis*, 466 U.S. at 301-302 (defining interrogation as statements "reasonably likely to elicit an incriminating response"). By offering cursory responses to non-substantive ques-

tions while remaining silent as to investigative ones, Thompkins offered the requisite sign that he wished to invoke his rights.

B. The Court Should Reject Petitioner's Request For A Two-Pronged Expansion Of The *Davis* Rule.

Perhaps recognizing the breadth of *Miranda*'s "indicate[ ] in any manner" invocation standard, petitioner and the Solicitor General ask the Court to extend the holding of *Davis* v. *United States*, *supra*, to this case. The Court should reject the invitation.

1. In *Davis*, the Court held that if a suspect who has waived the right to counsel later wishes to invoke that right, he must do so "unambiguously," by "articulating his desire * * * sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." 512 U.S. at 459. *Davis*, however, differed from this case in two fundamental ways: first, it involved a suspect who had already waived his right in the first instance; and second, it involved the right to counsel, not the right to silence.

a. The defendant in *Davis* "waived his rights to remain silent and to counsel, both orally and in writing," and then some 90 minutes later—well into the interrogation—said: "Maybe I should talk to a lawyer." 512 U.S. at 455. The *Davis* Court made clear that prior waiver was central to its rationale:

> A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although [our cases] provide[ ] an additional protection—if a

> suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.

Id. at 460-461; *see also id.* at 461 ("We therefore hold that, *after a knowing and voluntary waiver* of the *Miranda* rights, law enforcement officers may *continue* questioning until and unless the suspect clearly requests an attorney.") (emphases added).

That holding makes sense. Where a suspect has expressly said he does not want counsel and is willing to talk, police are entitled to interrogate him. The *Davis* rule thus merely requires clarity for a suspect to resurrect a privilege he has already surrendered. But cases where there has been no waiver stand in a different stead for two reasons. First, where the suspect has not yet waived his right to silence, the police should not be interrogating him at all. *See supra* at 8-12. The opportunity for ambiguity accordingly should never arise, and *Davis* has no application. In the words of *Davis,* police cannot "continue" interrogating a suspect if the interrogation has never begun.

Second, the fact of the matter is that many suspects, due to their own educational and linguistic limitations and the coercive nature of interrogation, simply will not have the wherewithal to forcefully present an oral invocation of their *Miranda* rights. *See, e.g.*, M. Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, 17 William & Mary Bill of Rights J. 773, 774 (2009) (collecting scholarship finding that "people use hedges * * * as a means of expressing politeness or being deferential."). The Court has recognized as much, observing in *Davis* that "some

suspects * * * because of fear, intimidation, lack of linguistic skills, or a variety of other reasons * * * will not clearly articulate their right to counsel although they actually want to have a lawyer present." 512 U.S. at 460. The *Davis* Court declined to soften its rule in response to that reality—but it did so on the rationale that a suspect who has "knowingly and voluntarily waive[d] his right to counsel" must "affirmatively invoke" that right to halt the questioning he had previously authorized. *Id.* That rationale does not apply in the pre-waiver context.

b. *Davis* involved not the right to remain silent, but the right to counsel. The Court there held that a suspect must invoke the right to counsel "unambiguously," *Davis*, 512 U.S. at 459, and that he must do so by means of an oral "statement." *Id.* If the first requirement applies to the right to silence, Thompkins meets it. After all, he sat for nearly three hours, head down, and apparently refused to answer any questions about the case. There is nothing ambiguous about that signal.

Davis' second requirement—an oral invocation "statement" requesting counsel—makes little sense in the right-to-silence context and should not be extended to that context. Such a "statement" is required with respect to the right to counsel simply because there is no other way to invoke that right. It is difficult to imagine how a suspect could signal that he wants to invoke his right to a lawyer without saying, "I want a lawyer" (or some variant). But that is not the case in the context of silence. As discussed above, a suspect can very easily "indicate[ ]" that he wishes to remain silent by remaining silent. There is

no reason in law or logic to require that the suspect speak in order not to speak.[16]

Petitioner and her *amicus* argue that there *is* a reason for such a requirement—namely, it makes it easy for the police to recognize when a suspect has invoked his rights. *See* U.S. Br. 13. But that concern for ease of application is overblown in this instance, because police could just as easily understand and apply the rule that follows from *Miranda*'s holding: If a suspect does not respond to initial interrogation, he has invoked his right to silence "in any manner."[17] And if the police are not sure whether the suspect is invoking his rights through silence, they can certainly ask.[18]

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[16] Petitioner correctly notes that "[m]any circuits" have applied *Davis* to the right to silence. Pet Br. 44. But most appear to have done so without examining the differences between the rights to counsel and silence. *See, e.g., Medina* v. *Singletary*, 59 F.3d 1095, 1100-01 (11th Cir. 1995) (applying *Davis* to right to remain silent without examination).

[17] Of course, there is another bright-line rule that kicks in earlier in the process: The defendant cannot be interrogated unless and until he waives his right to silence. *See supra* at 8-12. Our discussion of the proper invocation rule assumes that the suspect in question has previously waived his rights.

[18] The *Davis* Court observed that clarifying questions are "good police practice." 512 U.S. at 461. And while it declined to *require* police to ask such questions where the suspect's invocation of the right to counsel is facially "ambiguous," silence in the context of the right to silence admits of no ambiguity.

III. THE RULES PETITIONER ADVOCATES CONTRADICT POLICE PRACTICES ON THE GROUND.

Petitioner and the Solicitor General present their proposed rules as inescapably necessary to effective law enforcement. The Solicitor General, for example, argues that "presuming an invocation after some initial period of silence" would "create an impossible situation for the police, who would have no clear guidelines on their conduct when a suspect initially says nothing but appears receptive to listening." U.S. Br. 18-19. But these high-volume assertions are belied by actual police practice. In fact, current police training manuals and videos reveal that police are taught *not* to engage in prolonged interrogation of a suspect who fails to respond to initial questioning.

1. The available police training materials, state and federal, overwhelmingly suggest that what the detectives did in this case—namely, keep after Thompkins in the face of his extended silence—departed substantially from standard police practice. The widely-used Inbau Treatise, for example, teaches that "[a] custodial suspect who * * * indicates (even by silence itself after receiving the *Miranda* warnings) that he is unwilling to be questioned has obviously exercised his constitutional privilege against self-incrimination." Inbau Treatise at 498. Likewise, a training video created by the Federal Law Enforcement Training Center—which "is responsible for delivering * * * legal training to over 85 federal law enforcement agencies," including the Secret Service; the Bureau of Alcohol, Tobacco, and Fire-

arms; and the Internal Revenue Service[19]—offers the following training to federal agents: *"[I]f the suspect just stays quiet * * * the police should go away for at least two hours.* After two hours, they can then come back, re-advise him of his rights and try again." Federal Law Enforcement Training Center, *Self-Incrimination: Miranda Waivers and Invocations PODCAST* (emphasis added).[20]

The training offered to police in California is to the same effect. The state has an organ, the California Commission on Peace Officer Standards and Training ("POST"), that "sets standards for basic and advanced police training" and "certifies courses for law enforcement officers." *Mourning Miranda*, *supra*, at 1524. A POST training video on *Miranda* invocation teaches the state's law enforcement officials that even after a valid waiver has been obtained, "lengthy periods of silence" constitute an "invocation of the right to silence." POST, *The Case Law Today: Miranda Invocation of Right to Silence* (July 2009).[21] And a sourcebook for California law enforcement officers offers similar instruction with respect to waiver: It teaches that "silence * * * followed by grudging responses to leading questions"

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[19] Federal Law Enforcement Training Center Website, *available at* http://www.fletc.gov/training/programs/legal-division.

[20] *Transcript available at* http://www.fletc.gov/training/programs/legal-division/podcasts/fletc-legal-division-self-incrimination-roadmap-podcasts/self-incrimination-roadmap-podcasts-transcripts/miranda-waiver-podcast-transcript.html/?searchterm=interrogation.

[21] Counsel for *amici* have copies of this and the other video broadcasts mentioned in this brief on file. Copies of these videos will be made available to the Court upon request.

would be unlikely to establish a valid implied waiver of the right to silence. California Department of Justice, *California Peace Officers Legal Sourcebook* § 7.24b (Rev. Sept. 2008).

Current law enforcement practice, in short, undermines any claimed need for the petitioner's proposed rules.[22] It also suggests that, if adopted, those rules would subvert the settled practices of the nation's police.

* * *

In the final analysis, petitioner and the Solicitor General seek from this Court two new rules: first, that confession during lengthy interrogation suffices to prove waiver of the right to remain silent, and second, that a suspect must offer a clear and unambiguous *oral* invocation in order to cut off questioning. The combination of these two rules would dramatically reshape the law of custodial interrogation by forcing the defendant to prove that he invoked his rights, instead of forcing the government to prove that he waived them. The Court should decline this invitation to upset the balance *Miranda* carefully created.

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[22] To the extent the petitioner and the Solicitor General press such a need as the reason to change settled law, they have offered no evidentiary support. The Solicitor General's brief presents mere rhetoric; there is no empirical evidence of which we are aware—and the brief offers none—suggesting that the current rules pose any problems for effective law enforcement.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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OCTOBER TERM, 2009
No. 08-1470

MARY BERGHUIS, Warden,
Petitioner,
vs.

VAN CHESTER THOMPKINS
Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN, AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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BOTH SIDES —

4/19

Statement Of The Question

I.

Whether the Sixth Circuit expanded the Miranda rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within her jurisdiction, has a vital interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing.

Argument.

A. The Incoherence of Current Doctrine, and Suggestions for Repair

> *"Our forefathers, when they wrote this provision into the Fifth Amendment, had in mind a lot of history which has been largely forgotten today."*[1]

> *"...the Fifth Amendment actually means what it says."*[2]

Current doctrine concerning the admissibility of confessions is not coherent. It is not coherent because *Miranda v Arizona*[3] is not compatible with the text and history of the Fifth Amendment. Though this Court has declined to overrule that decision within the past decade, see *Dickerson v United States*,[4] this case present the Court with an opportunity to restore at least some semblance of adherence to constitutional text and history by modifying *Miranda*, a modification which can be

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[1] *Maffie v United States*, 209 F2d 225, 237 (1954)(Judge Calvert Magruder).

[2] Grano, *Confessions, Truth, and the Law* (University of Michigan Press: 1993), p.143

[3] *Miranda v Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966).

[4] *Dickerson v United States*, 530 U.S. 428, 432-433, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

accomplished without an outright overruling of that decision.[5]

Miranda's departure from the text and history of the Fifth Amendment is apparent within the decision, and was quickly demonstrated by further decisions from this Court. The opinion itself states that the confessions there being considered were not "involuntary in traditional terms"[6] (that is, not involuntary when measured by the actual Constitution). And that it is possible for voluntary confessions to be taken in the absence of the warnings required by *Miranda*---that in fact it is not the case that every confession that was the product of police questioning ever admitted in evidence in a criminal trial before 1966 was in fact involuntary and admitted into evidence in violation of the Constitution---was soon made plain by *Harris v New York*.[7] There the Court held that "Miranda-defective" statements that are inadmissible in the case-in-chief may be admitted into evidence if it is demonstrated that they were not coerced (were voluntary), and thus the Court itself recognized that not all Miranda-defective statements are actually obtained in violation of the Constitution.

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[5] Cf *Planned Parenthood v Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).where the Court substantially modified *Roe v Wade* while declining to overrule it.

[6] 384 US at 457.

[7] *Harris v New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

One incoherence created by *Miranda*, then, is its irrebuttable presumption of involuntariness that arises when a confession is taken on custodial interrogation without the giving of "adequate" Miranda warnings. There is no such thing as an "irrebuttable presumption." An "irrebuttable presumption" is simply a rule of law,[8] and, where built on circumstances designed to enhance or protect some underlying rule of law, invariably expands upon that rule of law, thereby modifying it. *Miranda* amended the Constitution by declaring certain statements barred *mandatorily* by the violation of prophylactic rules designed to ensure voluntariness, while *Harris* recognized that those same statements may be admitted into evidence to impeach when they were not *in fact* obtained in violation of the Constitution. But as Professor Grano has well demonstrated, when prophylactic rules are treated as irrebuttable presumptions---as rules of law---and applied to constitutional

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[8] See e.g. 2 *McCormick on Evidence* § 342; Duane, James, "The Constitutionality of Irrebuttable Presumptions," 19 Regent U. L. Rev. 149, 160 (.2006-2007)("...courts and legal scholars universally agree that any so-called "irrebuttable presumption," regardless of whether one chooses as a matter of semantics to call it a true presumption, is not really a rule of evidence at all, but is actually a rule of substantive law masquerading in the traditional language of a presumption. As one leading writer has observed, 'a conclusive or irrebuttable presumption is really an awkwardly expressed rule of law'").

provisions their application exceeds the authority of the Court, violating Article III."

A mundane example demonstrates the point. The law provides that serving alcohol to an individual under the age of 21 is forbidden. To avoid violation of this law, establishments that sell liquor often state "we require identification from anyone appearing under the age of 30." As a prophylactic rule, to protect against violation of the statute, then, one who appears under the age not of 21 but of 30 will be required to show identification. There is a rebuttable presumption that this individual may not be served alcohol, which may be rebutted by proof (valid identification). But if instead the state's Liquor Control Commission provided by way of regulation, designed to protect and enforce the drinking-age statute, that no establishment could *serve* any individual who appeared under the age of 30, that appearance being unrebuttable by valid identification, the regulation would have amended the statute, and undoubtedly impermissibly so. The regulation would sweep more broadly than the statute, and while it undoubtedly would exclude service of alcohol to some individuals under 21, it would also preclude service to some individuals over the age of 21, who may lawfully be served. So with *Miranda*--as in "irrebuttable presumption" of involuntariness (but only where the evidence is to be used in the case-in-chief, the presumption being rebuttable for impeachment use) the Miranda rules sweep more broadly than the Constitution. Some confessions

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" Grano, Joseph, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 NW. U. L. Rev. 100 (1985).

that would be demonstrated to be involuntary in any event may be kept out, but others that are voluntary "in traditional terms" are also excluded. This amends the Constitution, and exceeds the rightful authority of the Court. This can be revisited without overruling *Miranda*.

A second incoherence of *Miranda* is its transmogrification of the right not to be compelled to be a witness against oneself into a "right to remain silent." The latter is *not* simply a shorthand expression for the former, as it imports necessarily a waiver analysis foreign to the text and history of the Fifth Amendment. The *sine qua non* for involvement of the Fifth Amendment is coercive governmental conduct.[10] In the absence of coercive conduct by a governmental official, the fact that an individual speaks or does not speak, whether to some other "ordinary citizen" or even to a governmental official, has nothing to do with the Constitution. When one speaks voluntarily, he or she is not waiving his or her Fifth Amendment right not to be compelled to speak, the only right protected by the Fifth Amendment; rather, the speech is voluntary. If coerced, and by a governmental agent, the Fifth Amendment applies. But plainly no one, in speaking with a governmental agent, is saying, in effect:

> Yes, I understand that I have a right not be compelled to speak, but I choose to *waive* that right, and wish to be compelled to speak, so you may now proceed to engage in

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[10] *Colorado v Connelly*, 479 US 157, 107 S Ct 515, 93 L Ed 2d 473 (1986)

some coercive activity in order to gain my verbal cooperation.

Rather, if the consent to speak is not voluntary, then the individual has been compelled, and his or her statements are barred from admission at trial. But it is logically impossible to waive the right not to be compelled to speak, and this is what the Constitution protects, not any free floating "right to silence" *without regard* to coercive governmental conduct. There is no right to silence which must be waived knowingly and intelligently, there is an unwaivable right not to be coerced.

A hypothetical situation demonstrates this point as well. Under the First Amendment, no person may be forced by the government to pray or to attend church. When millions of citizens choose voluntarily to pray or to attend the church of their choice, are they thereby surrendering their "right not to pray" or "right not to attend church," and must they do so knowingly and intelligently in the constitutional sense? Of course not: the question makes no sense unless in the context of a claim of governmental coercion. There is no "right not to pray," or "right not to go to church" under the Constitution, there is rather a right not to be forced to do either by the government. There is also no "right to remain silent"; instead, there is a right not to be compelled to speak by the government, and speaking in the absence of compulsion is no more the waiver of a constitutional right than is praying or attending church without compulsion.[11]

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[11] As Professor Grano has aptly pointed out, if there indeed existed an independent constitutional right to remain silent (rather than a

A large measure of coherence may be returned to the law of confessions, amicus submits, by taking the text seriously. The law of confessions should be removed from consideration under the Fifth Amendment and returned to consideration under due process, which bars involuntary statements. The voluntariness inquiry may be undertaken without wholly overruling *Miranda* by treating the Miranda warnings not as independent constitutional "rights" which must themselves be waived, but as information that must be imparted to the individual in custody to help insure voluntariness. A failure to give the warnings or to give them appropriately creates not an "irrebuttable presumption" or rule of law sweeping more broadly than the actual Constitution, but a true evidentiary presumption that may be overcome by proof of voluntariness (in the same manner as done now for use of Miranda-defective statements for impeachment). By jettisoning the "irrebuttable presumption"/rule of law of involuntariness for Miranda-defective statements (when sought to be used in the case-in-chief) and the inappropriate waiver analysis (an analysis the Court properly avoided when considering the voluntariness of consent to search under the Fourth Amendment, where one is not "waiving" his or her right not to be unreasonably searched by

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court-created requirement of a *warning* regarding silence which serves as one portion of a prophylaxses designed to *protect* a constitutional right--the right not to be compelled), there is no principled basis on which the right and the waiver analysis could be limited to custodial interrogation. See Grano, *Confessions, Truth, and the Law*, p.142-143.

consenting to a search; rather, a voluntary consent renders the search reasonable, and thus the question is one of voluntariness and not waiver[12]), a greater coherence may be obtained, though Miranda not wholly overruled.

B. The Fifth Amendment in History

The protection of the Fifth Amendment is against *compelled* self-incrimination in criminal cases. And yet at the time of the Founding, and also of the ratification of the Bill of Rights, no state even *permitted*, much less compelled, an accused in a criminal case to testify. It was not until 1864 that Maine became the first state to permit defendants to testify, and Congress did not follow suit until 1878.[13] But criminal defendants were not actually silent at their trials, they simply were not competent as sworn witnesses. Instead, the defendant was permitted—and often expected—to give an unsworn statement at trial on his own behalf, and was also expected to give a statement *pretrial*. The failure to make a statement to the justice of the peace *would be reported to the jury*.[14]

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[12] *Schneckloth v Bustamonte*, 412 U.S. 218, 248-249, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (1973).

[13] See Ralph Rossum, "'Self-Incrimination': The Original Intent," in Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding* (University of Virginia Press: 1991), p.276.

[14] Langbein, "The Privilege and Common Law Criminal Procedure," in *The Privilege Against Self-Incrimination*, quoted by Justice Scalia,

As Sir James Stephen noted, evidence given against the defendant operated as "so much indirect questioning," and if the defendant "omitted to answer the questions it suggested he was very likely to be convicted."[15] If a defendant was not permitted to be a witness at trial, but was expected to make unsworn statements, the failure to do so to be held against him, why, then, the inclusion of the Fifth Amendment protection against compelled self-incrimination in criminal cases?

Some scholars, Leonard Levy principal among them, take the view that the Founders, and the members of state constitutional conventions which enacted similar protections on which the Fifth Amendment was based, "failed to say what they meant," for if they meant what they said, then the common-law prohibition on testimony from the accused in criminal cases rendered the Fifth Amendment superfluous.[16] Instead, concluded Levy, what those individuals drafting state Bill of Rights and the Fifth Amendment actually *meant* to do was adopt the common-law right of *nemo tenetur seipsum acusare* (no one is bound to accuse himself), which protected not only against courts in criminal cases, but against all of government, in all kinds of actions, protecting witnesses as well as the accused, and protecting against "threats of criminal

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dissenting, in *Mitchell v United States*, 526 US 314, 119 S Ct 1307, 143 L Ed 2d 424 (1999).

[15] J. Stephen, 1 *History of the Criminal Law of England* 440 (1883).

[16] See Levy, *The Origins of the Fifth Amendment (2d Ed)* (MacMillan: 1986).

liability, civil exposure, and public obloquy."[17] This redrafting of the Fifth Amendment is not tenable.

Professor Rossum nicely notes that Levy and his followers fail to take account of the very real probability—given the express language of the Fifth Amendment—that the drafters were not writing to "end some current abuse but simply to provide a floor of constitutional protection above which the common law was free to operate but below which it could not go."[18] Though it seems quaint now, during the 17th century the very giving of an *oath* was held itself to be a coercive act, and the ecclesiastical Court of High Commission engaged in the practice of summoning those with nonconformist opinions and requiring them to take an oath and answer questions. Refusing the oath resulted in contempt and Star Chamber proceedings; lying under oath was perjury; telling the truth under oath could subject one to prosecution for political and religious crimes. The celebrated trial of John Lilburne, a Puritan agitator who refused to take the oath, led to the prohibition of the administration of any oath obliging a person "to confess or accuse himself or herself of any crime."[19] Professor Albert Alschuler concludes that the history of the Fifth Amendment is "almost

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[17] See Rossum, at 276.

[18] Rossum, at 277.

[19] See Wigmore, "The Privilege Against Self-Incrimination: Its History," 15 Harv L Rev 610, 621-24 (1902).

entirely a story of when and for what purposes people would be required to speak under oath."[20]

Requiring an oath of the criminally accused was coercive, and banned for that reason, as being equivalent to torture and the rack. Manuals which instructed justices of the peace on the conduct of their office warned, from the late 16th century through the mid- 19th century, that "The law of England is a Law of Mercy, and does not use the Rack or Torture to compel criminals to accuse themselves....I take it to be for the Same Reason, that it does not call upon the Criminal to answer upon Oath. For, this might serve instead of the Rack, to the Consciences of Some Men, although they have been guilty of offenses...."[21]

To put the matter finely, then, the purpose of the Fifth Amendment, when understood in its historical context, was "to outlaw torture and improper methods of interrogation," *including the compelling of testimony under oath.*[22] Historically in this country the voluntariness of statements was litigated under the due-process clause, and should be returned there, as it better comports with both text and history.[23] But whether considered under the Fifth Amendment or due process, the question

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[20] Alschuler, "A Peculiar Privilege in Historical Perspective: The Right to Remain Silent," 94 Mich L Rev 2625, 2638 (1994).

[21] See Alschuler, at 2648.

[22] Alschuler, at 2631.

[23] See Grano, *Confessions, Truth, and the Law*, supra, at pp. 87-143.

is one of voluntariness---of whether the police employed coercive tactics that should not be tolerated---and not one of waiver.

C. Conclusion and Application

The purpose of *Miranda* was to provide an in-custody suspect with information the Court thought necessary to insure that a decision to speak was made voluntarily, given that which the Court perceived as the "inherently coercive" nature of custodial interrogation. To help dispel that "coercive atmosphere" so as to allow a voluntary decision (not a wise one, nor even an informed one, but that to which the Constitution speaks---a *voluntary* one), the suspect was held required to be informed that he or she need not speak (has a "right to remain silent"); informed that if he or she does speak, the statement may be used as evidence against him; and informed of the "right to the presence of an attorney, either retained or appointed." And the suspect must be informed that if he or she chooses to speak, he may cease doing so at any time (may exercise one of these "rights" at any time). But the Court went further, and though it held that providing this information was essential to the giving of a voluntary statement, said also that the defendant could "waive effectuation of these rights, providing the waiver is made voluntarily, knowingly and intelligently."[24]

But the purpose of supplying this information is to insure voluntariness, not to provide independent "rights." Again, one has a right to remain silent only in that one has a right not to be compelled,

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[24]384 US at 444.

and informing him that he need not speak is not to provide an independent right but to help insure that he does not speak solely because of the "coercive atmosphere" of custodial interrogation. And there is no Sixth Amendment right to counsel at this time, and to find a "Fifth Amendment" right to counsel is contra-textual." Rather, one has the "right"to an attorney in that he or she is free to call one in for assistance, again to help dispel the coercive nature of custodial interrogation. Amicus suggests that the requirement that the suspect be informed that counsel will be appointed to assist him at this stage if he or she cannot afford one should be modified as unsupported by law and by fact. The request for the provision by the government of an attorney is virtually never met with the actual provision of an attorney; rather, questioning ceases,[25] and may not be re-started unless the defendant initiates the session (an "anti-badgering" or voluntariness rule). The suspect should be told that he or she has the right to an attorney if they wish to call one, and if one is desired but the suspect cannot afford one, questioning will stop.

Here, all information required by Miranda to dispel the inherently coercive nature of custodial interrogation was supplied to the respondent to

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[25] *Minnick v Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990) is the exception that proves the rule, and even after the provision of an attorney to the suspect there the confession was suppressed because the police spoke to the suspect after his attorney counseled him not to speak to them without defendant initiating the contact, though the statement was entirely voluntary.

enable him to make a voluntary choice whether to speak. He indicated he understood this information, and the police then talked to him in a manner that cannot be described as coercive, defendant never indicating that he did not wish to speak or that he wished an attorney (which would have cut off questioning). This statement was not obtained in violation of the Constitution, and thus should be admissible at the least in any state court; retrial is thus neither required nor appropriate here.

In sum, then, questions of confessions obtained by means of custodial interrogation should be treated under the due-process clause rather than the Fifth Amendment. But whichever provision is applied, the warnings required by Miranda should be considered as information that must be supplied to the suspect to ensure voluntariness, rather than independent rights which must be "waived" (and the right to counsel warning should be modified to a warning that if the suspect wishes an attorney and cannot afford one, questioning will cease). The failure to give Miranda warnings, or to give them "adequately," should be viewed as raising a rebuttable presumption of involuntariness, which may be overcome by proof, as is now done in cases where impeachment use of such confessions is sought. Confessions that are found to be involuntary should be excluded, those that are found to be voluntary should be admitted, no constitutional provision having been violated in obtaining them.

Conclusion

Wherefore, the Petitioner submits that the Sixth Circuit should be reversed.

Respectfully submitted,

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